

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. J. ROWE,

Plaintiff in Error,

vs.

ALASKA BANKING AND SAFE DEPOSIT COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Second Division.

FILED

FEB 15 1913

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Attorneys of Record.

ELWOOD BRUNER, Nome, Alaska, Attorney for Plaintiff.

IRA D. ORTON, Nome, Alaska, Attorney for Defendant.

In the District Court, District of Alaska, Second Division.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of the defendant and alleges:

1.

That the defendant, Alaska Banking & Safe Deposit Company, is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and doing business in the District of Alaska.

2.

That the Pacific Cold Storage Company, herein-after mentioned, is a corporation organized and existing under and by virtue of the laws of the State of Washington, and doing business in the District of Alaska.

3.

That E. W. Carlton & Co., hereinafter mentioned,

is a copartnership composed of E. W. Carlton and J. A. Milne, doing business in the District of Alaska.

4.

That between the 28th day of February, 1911, and the 7th day of July, 1911, the said plaintiff, W. J. Rowe, sold merchandise to, and performed work and labor for, the defendant, and at the request of the defendant delivered the said merchandise and performed the said labor to and for the Thorson Mining Company, a copartnership doing business at or near the Town of Nome, in said District of Alaska.
[1*]

5.

That said defendant promised to pay the plaintiff the reasonable value of said merchandise and said work and labor; that the reasonable value of said merchandise, and said work and labor was and is the sum of \$3,522.01, and that the defendant has paid on account thereof the sum of \$1,882.00, and no more.

6.

That there is now due and owing from the defendant to the plaintiff the sum of \$1,640.01, no part of which has been paid.

And for a second further and separate cause of action against said defendant, plaintiff alleges:

1.

That between the 11th day of February, 1911, and the 23d day of June, 1911, the aforementioned Pacific Cold Storage Company, a corporation, as aforesaid, sold and delivered to the defendant meat and

*Page-number appearing at foot of page of original certified Record.

butcher supplies of the reasonable value of \$665.11, and at the request of the defendant delivered the same to the aforementioned Thorson Mining Company.

2.

That the defendant promised to pay to the said Pacific Cold Storage Company the sum of \$665.11 therefor, but that it has not paid the said sum nor any part thereof, save and except the sum of \$252.68.

3.

That prior to the commencement of this action, for a valuable consideration, the said Pacific Cold Storage Company, a corporation, as aforesaid, by an instrument in writing, sold and delivered the said account to the plaintiff, who is now the owner and holder of the same.

4.

That there is now due and owing from the defendant to the [2] plaintiff the sum of \$412.43, on said account.

And for a third further and separate cause of action against said defendant, plaintiff alleges:

1.

That between the 13th day of February, 1911, and the 27th day of June, 1911, the said E. W. Carlton & Co., a copartnership, as aforesaid, sold and delivered to the defendant hardware and other mining supplies of the reasonable value of \$674.20, and at the request of the defendant delivered the same to the aforesaid Thorson Mining Company.

2.

That the defendant promised to pay the said E. W. Carlton, the sum of \$674.20 therefor.

3.

That before the commencement of this action the said E. W. Carlton & Co. sold, assigned and delivered, by an instrument in writing, said account to the plaintiff, and the plaintiff is now the owner and holder of the same.

4.

That defendant has not paid the said account nor any part thereof save and except the sum of \$301.00, and there is now due and owing from the said defendant to the plaintiff the sum of \$373.20, on said account.

WHEREFORE, plaintiff prays judgment against the said defendant for the sum of \$2,425.64, and for his costs of suit.

ELWOOD BRUNER,
J. ALLISON BRUNER,
Attorneys for Plaintiff. [3]

United States of America,
District of Alaska,—ss.

W. J. Rowe, being first duly sworn, on his oath, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the within and foregoing complaint, knows the contents thereof, and believes the same to be true.

W. J. ROWE.

Alaska Banking and Safe Deposit Company. 5

Subscribed and sworn to before me this 22d day of July, 1911.

[Notarial Seal] J. ALLISON BRUNER,
Notary Public, District of Alaska.

[Endorsed]: #2303. No. ——. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Company, a Corporation, Defendant. Complaint. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 25, 1911. John Sundback, Clerk. By ———, Deputy. L. Elwood Bruner, J. Allison Bruner, Attorneys for Plaintiff. [4]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

W. J. ROWE,
Plaintiff,
vs.
ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant, by its attorneys, and answering the plaintiff's complaint herein, denies each and every allegation, matter, and thing in the said complaint contained, and the whole thereof; except, only, it admits the allegations of paragraph numbered 1, and denies any knowledge or informa-

tion sufficient to form a belief of the allegations of paragraph numbered 3, on page numbered (1) of said complaint.

And for a further and separate answer and defense the defendant alleges that it is a corporation duly organized and incorporated under and by virtue of the laws of the State of West Virginia for the purpose of buying and selling bullion and mining claims, receiving deposits of gold, valuables, and securities for safekeeping, buying and selling exchange, and transacting such business as is usually conducted by banking and safe deposit institutions, and also for the purpose of transacting the business of a title and trust company as provided by the laws of the State of West Virginia in reference thereto, and for no other purpose; that during all the times mentioned in plaintiff's complaint the defendant was, and now is, conducting a banking and safe deposit business and buying and selling bullion and exchange, at Nome, Alaska, and doing no other business; and that the defendant was, and is, without any power or authority to hire labor or purchase merchandise for the purposes mentioned in plaintiff's complaint, or to make any of the agreements [5] or promises set forth in said complaint.

Wherefore, the defendant demands judgment that the plaintiff take nothing by his said action, and that the defendant recover from the plaintiff its costs and disbursements herein.

F. E. FULLER,
IRA D. ORTON,
Attorneys for Defendant.

District of Alaska,—ss.

F. H. Thatcher, being first duly sworn, deposes and says: That he is the president and manager of the above-named defendant corporation and makes this affidavit and verification in its behalf; that he has read the foregoing answer and knows the contents thereof, and that he believes the same to be true.

F. H. THATCHER.

Subscribed and sworn to before me this 24th day of August, 1911.

[Notarial Seal]

F. E. FULLER,

Notary Public.

Due service of within answer is hereby admitted this 24th day of August, 1911.

J. ALLISON BRUNER,

Of Attys. for Plaintiff.

[Endorsed]: No. 2303. In the District Court for the District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Answer. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 24, 1911. John Sundback, Clerk. By ———, Deputy. L. F. E. Fuller, Ira D. Orton, Attorneys for Defendant. [6]

*In the District Court, District of Alaska, Second
Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO., a
Corporation,

Defendant.

Reply.

Comes now the plaintiff and for reply to the further and separate answer and defense of the defendant, denies each and every allegation contained in said further and separate answer and defense.

ELWOOD BRUNER,
J. ALLISON BRUNER,
Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

W. J. Rowe, being first duly sworn, on his oath deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and that the same is true.

W. J. ROWE.

Subscribed and sworn to before me this 29th day of August, 1911.

[Notarial Seal] J. ALLISON BRUNER,
Notary Public, District of Alaska. [7]

Service of the within Reply is hereby accepted
this 29th day of August, 1911.

F. E. FULLER,
Atty. for Defendant.

[Endorsed]: #2303. In the District Court for
the District of Alaska, Second Division. W. J.
Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit
Co., Defendant. Reply. Filed in the office of the
Clerk of the District Court of Alaska, Second Division,
at Nome. Aug. 29, 1911. John Sundback,
Clerk. By _____, Deputy. L. Elwood Bruner,
J. Allison Bruner, Attorneys for Plff. [8]

**[Minutes, October 3, 1911—Re Motion for Judgment
of Nonsuit, etc.]**

*In the District Court for the District of Alaska,
Second Division.*

Term Minutes, General 1911 Term, Beginning February 1, 1911.

Tuesday, October 3, 1911, at 10 A. M.
Court convened pursuant to adjournment.

Hon. CORNELIUS D. MURANE, District Judge,
Presiding.

Upon the convening of Court the following proceedings were had:

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W. J. ROWE

vs.

ALASKA BANKING & SAFE DEPOSIT CO.

* * * * *

Thereupon Mr. Orton for defendant moved the Court for a judgment of nonsuit against the plaintiff, upon the ground that plaintiff had failed to prove a cause sufficient to be submitted to a jury, motion based on subdivision 3, section 237, of the Code. Motion made as to entire action, and separately as to each cause of action.

That the evidence fails to show that any goods were sold and delivered to the defendant by respective parties named as plaintiffs; that evidence fails to show that Mr. Sheldon had any authority on behalf of Alaska Banking & Safe Deposit Co. to make any agreement or contract for the sale of goods to be delivered to Thorsen & Co.; and on the further ground that the alleged guarantee given by Mr. Sheldon is oral, and the alleged contract alleged to have been given by him was oral and therefore within the Statute of Frauds.

The Court admonished and excused the jury until 2 P. M. to-day.

Thereupon the Court adjourned until 1 P. M. to-day.

1 P. M.

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W. J. ROWE

vs.

ALASKA BANKING & SAFE DEPOSIT CO.

Argument on motion for nonsuit was resumed,—Mr. Elwood Bruner for plaintiff, and Mr. Orton concluding for defendant.

The jury were then called into the jury-box and all answered present.

Motion for judgment for nonsuit was granted.

The jury were thereupon discharged from further attendance on this case. [9]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Judgment.

This action came on regularly for trial before the above-named court on the 2d day of October, 1911, Elwood Bruner, Esq., appearing for the plaintiff and F. E. Fuller, Esq., and Ira D. Orton, Esq., appearing for the defendant, and a jury was duly empaneled and sworn to try the issues in said action and evidence was given on the part of the plaintiff and the plaintiff's testimony was closed, and thereupon the defendant moved for a judgment of nonsuit upon the ground that the plaintiff had failed to prove a cause sufficient to be submitted to the jury; and such motion was argued by counsel and duly submitted to the Court, and the Court, having duly considered the same and being fully advised in the premises,

allowed said motion and ordered that said action be dismissed; and thereafter the plaintiff filed his motion for a new trial and the same was duly submitted to the Court and by the Court denied, and it was ordered that judgment be entered herein.

Wherefore, by reason of the law and the premises, it is now ordered, adjudged and decreed that the said action be, and it hereby is, dismissed, and it is further ordered, adjudged, and decreed that the defendant, Alaska Banking & Safe Deposit Company, have and recover from the plaintiff, W. J. Rowe, its costs and disbursements herein, taxed at \$55.80, and accruing costs, and that execution issue therefor.

Done in open court this 14 day of October, 1911.

CORNELIUS D. MURANE,
District Judge.

O. K.—E. B. [10]

[Endorsed]: No. 2303. In the District Court for the District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Judgment. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 14, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. F. E. Fuller, Ira D. Orton, Attorneys for Deft. Vol. 9, Orders and Judgments, p. 164. C. [11]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

WILLIAM J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

The above-entitled action came on regularly for trial on the —— day of ———, 1911, before the Honorable Cornelius D. Murane, Judge of the above-entitled court, whereupon a jury of twelve persons was duly empaneled; plaintiff was represented by Elwood Bruner, his attorney, and the defendant by Messrs. Ira D. Orton and F. E. Fuller, its attorneys, and following are the proceedings had on the trial:

[12]

After the jury was sworn the opening statement for plaintiff was made by Elwood Bruner and for the defendant by Ira D. Orton.

[Testimony of Joe V. Sheldon, for Plaintiff.]

Thereupon Mr. JOE V. SHELDON was called as a witness on behalf of the plaintiff, and after being first duly sworn testified as follows:

Direct Examination.

I am a resident of Nome, Alaska. During the months of January, February, March, April, May

(Testimony of Joe V. Sheldon.)

and June, of the year 1911, I occupied the position of Acting Cashier of the Alaska Banking & Safe Deposit Company, the defendant in this action. I acted in that capacity until the arrival of Mr. Thatcher from the outside; he is the manager and cashier of the bank.

Thereupon the following questions were asked and the following answers given:

Q. (By Plaintiff's Counsel.) Were you also acting as manager of the bank during that period?

A. I don't know whether you would call it manager or not.

Q. Was there any person acting or attending to the business affairs of the bank, or had charge of the affairs of the bank, besides yourself?

A. Mr. Thatcher was manager of the bank.

Q. In Nome, I mean—was there any person in Nome, attending to the business of the bank who had more authority than you had in that regard?

A. Not in Nome.

Q. Not in Nome? A. No, sir. [13]

Q. You were acting manager of the bank as well as acting cashier, were you not?

Mr. FULLER.—Object to any testimony that he was acting manager of the bank, because there is no such officer known to the banking business.

The COURT.—Objection sustained.

To which ruling of the Court an exception was then and there taken and duly allowed by the Court.

Q. Well, during that time you were directing the affairs of the bank in Nome, were you not?

(Testimony of Joe V. Sheldon.)

Mr. FULLER.—Objected to as leading.

The COURT.—Objection overruled.

Mr. BRUNER.—The Court will take judicial notice that this is a hostile witness.

Mr. ORTON.—There has nothing been shown so far, that the witness is in anywise hostile or otherwise.

A. Why, yes; I suppose so.

Q. Do you know Al. Folsom? A. Yes, sir.

Q. Now, during the months I have named, February, March, April, May, and June, had he anything to do with the business of the bank?

A. No, sir, he did not.

Q. Was he in the employ of the bank in any way?

A. What is that?

Q. Was he an employee of the bank in any way?

A. Why, I asked him to expert some ground for me.

Q. Did you ask him to expert the claim that was being worked by the Thorsen Mining Company?

A. Yes, sir. [14]

Q. That was in February, wasn't it of that year?

A. I don't remember exactly when it was now.

Q. It was before—do you remember taking a mortgage on behalf of the bank on the property of the Thorsen Mining Company?

Mr. ORTON.—That is objected to as irrelevant, and immaterial, and would not tend in any way to show that the Alaska Banking & Safe Deposit Company, purchased any goods of any of these parties plaintiff, or any of them.

(Testimony of Joe V. Sheldon.)

Mr. BRUNER.—We may just as well have this question settled now, and I will state to counsel and the Court that I am asking this question for the purpose of showing the course we intend to pursue in this case. We are going to contend that the Alaska Bank through this particular act on the part of Mr. Sheldon, in sending Thorsen Mining Company out these goods with which to mine the ground. We want to show it as a consideration for which he made these promises to pay for these goods which he had made to these parties, to show the absolute interest of the bank for which he was acting cashier and in charge of its affairs.

Mr. ORTON.—That don't in any way tend to show it, that he sent out Mr. Folsom to expert any ground belonging to the Thorsen Mining Company.

The COURT.—The objection is sustained; we cannot anticipate evidence in this way.

Exception taken by plaintiff and allowed.

(Paper handed witness.)

A. Yes, sir. [15]

Mr. BRUNER.—We will offer this for identification at this time; we will ask to have it marked for identification, but we are not offering to introduce it in evidence at this time, said paper being a chattel mortgage from H. Thorsen et al, to the Alaska Banking & Safe Deposit Co.

(Paper referred to marked for Identification
“Plaintiff’s Identification ‘A.’ ”)

Q. Do you know Pete Olsen? A. I do.

Q. Do you know Gus Lynell? A. I do.

(Testimony of S. W. Taggart.)

Mr. BRUNER.—That will be all with this witness at this time.

(Witness withdrawn.)

[**Testimony of S. W. Taggart, for Plaintiff.]**

Mr. S. W. TAGGART, a witness called on behalf of plaintiff, being duly sworn testified as follows:

Direct Examination.

I am in the employ of the Pacific Cold Storage Company in Nome, Alaska. I am acting manager or resident manager, whatever you are a mind to call it. I know the Thorsen Gold Mining Company.

Thereupon the following proceedings were had:

Q. (By Plaintiff's Counsel.) State whether or not you did any business with the Thorsen Gold Mining Company on behalf of the Pacific Cold Storage Company during the last winter months?

A. Yes, sir.

Q. Did Mr. Sheldon, or any other person on behalf of the Alaska Banking & Safe Deposit Company, order any goods to be delivered by you to the Thorsen Mining Company? [16] A. They did.

Mr. ORTON.—Objected to as leading, and also as calling for a conclusion of the witness as to whether any person was acting on behalf of the Alaska Banking & Safe Deposit Company. We make the further objection that the cashier of the Alaska Banking & Safe Deposit Company had no implied authority to order goods to be delivered to the Thorsen Mining Company.

Mr. BRUNER.—I am getting at their relations

(Testimony of S. W. Taggart.)
with these plaintiffs in that regard.

Mr. ORTON.—We object to the question because the cashier of a bank has well defined authorities, and it is not one of the implied authorities of a cashier of a bank to buy or purchase butcher's supplies, or any other goods, wares or merchandise, for any third person upon the credit of the bank; that is not one of the ordinary powers of a cashier, in the ordinary business carried on by a bank.

Mr. BRUNER.—We expect to show that Mr. Sheldon acting on behalf of the Alaska Bank, and representing the Alaska Bank made these purchases.

Mr. FULLER.—We object to the statement of counsel in the presence of the jury.

The COURT.—The witness has answered the question.

Mr. ORTON.—I move to strike out the answer of the witness.

The COURT.—Motion is sustained.

Mr. ORTON.—I will resubmit my objections—shall I restate them, your Honor? [17]

The COURT.—No, it will not be necessary to restate them. The objection will be overruled at this time.

(Question read.)

A. I did—they did.

Q. State as near as you can what date it was in February when you made your arrangements with Mr. Sheldon.

Mr. ORTON.—That is objected to as the witness

(Testimony of S. W. Taggart.)

has not stated that he made any arrangements with Mr. Sheldon.

The COURT.—The question is immaterial so far, because it presumes something the witness has not stated. Objection sustained.

Exception taken by plaintiff and allowed.

Mr. BRUNER.—He testified that he made arrangements on behalf of the Thorsen Mining Company, through the bank.

Mr. ORTON.—We object to this question as presuming that the witness has made any arrangement whatever with Mr. Sheldon. The witness has testified that he had made arrangements in connection with Thorsen Mining Company, with the Alaska Bank, but he did not state that he had any arrangements whatsoever with Mr. Sheldon.

The COURT.—There is nothing before the Court at this time. Proceed with another question.

Q. State the circumstances, then, Mr. Taggart, with whom you consulted on behalf of the Alaska Bank.

Mr. ORTON.—That is objected to as assuming that he made any arrangements with the Alaska Bank.

The COURT.—Objection sustained. [18]

To which ruling of the Court the plaintiff then and there excepted and an exception was allowed.

Q. Did you sell any goods to the Alaska Bank or on the order of the Alaska Bank, Mr. Taggart, and upon the order of the bank deliver the same to Thor-sen Mining Company?

Mr. ORTON.—I object to that because I don't

(Testimony of S. W. Taggart.)

understand in a case of this kind that he can testify to the case wholesale in this manner. If counsel are going to put in their case in this leading manner, without any direct testimony concerning the identity of the person or persons to whom he sold the goods, we certainly shall object to the same because it is calling for the conclusion of the witness. We think he should state the facts leading up to this transaction and let the jury determine whether or not any goods were sold to the bank. We object to it as being incompetent, irrelevant and immaterial, and leading.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff excepted and an exception was duly allowed.

Q. Did you have any connection with the Alaska Banking & Safe Deposit Company in connection with the delivery of any goods to the Thorsen Mining Company? A. I did.

Q. State what they were.

A. I delivered goods to Thorsen Mining Company upon the order of Joe Sheldon, of the Alaska Bank.

Mr. ORTON.—That is objected to as a conclusion of the witness, and move to strike out the statement [19] of the witness. I think there should be some testimony as to what Mr. Sheldon said, and not give his conclusions. That is the very question for the Court and jury to determine from the evidence—upon what the order may have been based—what was said, and not allow the witness to testify to his conclusions, which is a mixed question of law and fact.

(Testimony of S. W. Taggart.)

I move to strike out the answer of the witness as his conclusion, without basing his answer upon what Mr. Sheldon said.

The COURT.—The conclusion will be stricken out. I think Mr. Taggart should simply state what their business relations were, what was said and done and what the transaction was, and show in what relation Mr. Sheldon stood with the bank in this transaction, which will be determined by what was said and done.

Q. Now, Mr. Taggart, will you simply state what your business relations were—what was said and done by you and Mr. Sheldon in relation to the bank in this transaction?

Mr. ORTON.—I desire to make the further objection with reference to Mr. Sheldon that Mr. Sheldon had no authority from the bank—that it does not appear that he had any actual authority or implied authority to purchase goods, wares and merchandise and order them delivered to a third party on the credit of the bank, or on credit.

The COURT.—Objection overruled.

A. I can't tell without some explanation; I don't know how. [20]

Q. Well, tell what conversation you had with Mr. Sheldon in regard to the bills of the Thorsen Mining company.

A. When we shut down credit to Thorsen Mining Company, and refused to let them have any more goods—

Mr. ORTON.—(Interrupting.) I move to strike

(Testimony of S. W. Taggart.)

out the answer of the witness as not responsive, incompetent, irrelevant and immaterial to the allegations in this complaint.

The COURT.—The answer will be stricken out. The only thing you are called upon to testify to now is the transaction you had with Mr. Sheldon, what he said and what you said.

A. There were several conversations had, your Honor.

Q. Tell the conversation that ultimately culminated in the deal—what he said and what you said, whatever it may be.

A. Mr. Sheldon telephoned me and told me he wished I would furnish them with a mutton. He said he would see that it was paid. I think, however, Mr. Louis Stevenson guaranteed payment for that mutton.

Mr. ORTON.—I move to strike out this answer of the witness, since it seems it was not a transaction with Mr. Sheldon at all but Mr. Stevenson.

The COURT.—I will allow it to stand; it is evidently preliminary. Motion denied.

Q. Who paid for that mutton?

A. The bank did.

Q. The bank, through what person?

A. Well, the only one who had charge of the affairs.

Q. Well, who? [21]

A. Mr. Sheldon did, and authorized us to deliver to the Thorsen Mining Company whatever they wanted—

(Testimony of S. W. Taggart.)

Mr. FULLER.—We object to any statement of the witness that any party authorized him to do anything without giving the conversation and words upon which said statement is made so that the Court and jury may judge whether there was any such authorization made.

The COURT.—Motion sustained; you will have to give the language Mr. Sheldon used in that regard.

A. He said to deliver to the Thorsen Mining Company whatever they might order, and bring the bills over to the bank “and I will pay them.” That is what he said.

Q. And now did you deliver anything upon that order? A. We did.

Q. Did you deliver goods to the Thorsen Mining Company? A. We did.

Q. Did you present your bills to the Alaska Bank? A. I did.

Mr. ORTON.—That is objected to as immaterial, incompetent, and immaterial. It is now shown that this conversation was oral, and not in writing, and therefore is invalid, and I move to strike out the answer of the witness concerning this transaction, all of it, for that reason.

The COURT.—Motion overruled.

Q. Did you present any bills to the bank?

A. I did—I did not present them myself but I had them presented.

Q. Where did you present these bills? [22]

A. To the Alaska Bank.

Q. And who paid them? A. The Alaska Bank.

(Testimony of S. W. Taggart.)

Q. To you?

A. I never saw the checks, but they were paid by the bank and at the bank.

Mr. ORTON.—We move to strike out the answer. Now, it appears that he never saw the checks himself, by his own answer. We move to strike out all the testimony relating to the payment of the checks by the bank, as it now appears that they were not paid to him, and that he never has seen the checks.

The WITNESS.—I will take that back. I did see the last check, because this controversy came up before the last check was deposited and I saw it.

Mr. ORTON.—We move to strike out everything except relating to the last check as hearsay.

The COURT.—Motion granted.

To which ruling of the Court an exception was taken by plaintiff and duly allowed.

Q. Now, tell us whether or not any credits were made at the bank on your account at the bank upon checks drawn at the bank?

Mr. ORTON.—That is objected to for the reason that it already appears that the witness does not know anything about any checks, except the very last one, that he never saw them and anything he may know or testify to is simply hearsay. Furthermore, the book itself is the best evidence of the credits made.

I saw one check, but I don't remember the amount of it. I did not personally deliver any of these [23] goods myself. I ordered them delivered, and know that the goods were delivered.

At this time the witness was withdrawn.

[Testimony of Geo. L. Marshall, for Plaintiff.]

Mr. GEO. L. MARSHALL, a witness produced on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

Mr. ORTON.—I desire to ask leave to make a motion now to strike out all of the testimony of Mr. Taggart, with reference to the conversations with Joe V. Sheldon, of the Alaska Banking & Safe Deposit Company with reference to ordering any goods, wares and merchandise on the ground that a cashier has no authority to bind the bank by any such conversation or agreement.

The COURT.—The motion will be denied.

The witness then testified as follows:

I am bookkeeper for the Pacific Cold Storage Company, and have held such position for over a year. I have full knowledge of the books of the Pacific Cold Storage Company in Nome. I was such bookkeeper during the months of January, February, March, April, May and June of this year, and up to the present time. I have here the original books of entry of the accounts of the Thorson Gold Mining Company; the items contained in this book are correct. (The witness then read the items of sales from February 11th, 1911, to and including June 23d, 1911.) The total amount of sales during that period being \$665, upon which credits are entered on March 7th and up to July 15th of a total of \$252.68, leaving a balance [24] due on the account of \$411.43. It was one of my duties to pre-

(Testimony of Geo. L. Marshall.)

sent bills and collect same. I presented bills for all the goods I have mentioned to Mr. Joe Sheldon at the Alaska Bank.

Thereupon the following proceedings were had:

Q. (By Plaintiff's Counsel.) And the credits that you have entered upon the books there, who paid them?

A. Well, the cash Mr. Sheldon paid. I think all of the credits which are entered there with the exception of the "beef returned" were all made to me by Mr. Sheldon after having sent them out to the mine to be returned and O.K.'d, and were then paid by Mr. Sheldon.

Q. All the credits with the exception of three items were paid to you?

A. Yes, all with the exception of the three items and this credit of "beef returned," Mr. Sheldon paid them all to me as far as I can remember, after Mr. Sheldon called me up and asked me to come over and get the money, after the bills were returned from the foreman at the mine, he having O.K.'d them, then Mr. Sheldon called me up and asked me to come around and get the money.

Q. Did you present the bills for this balance due there?

A. Yes; I gave him the bills June 27th; that was the last item I gave him, on July 1st. On July 1st I closed my accounts and I gave him the bill June 27th.

Q. Has that been paid, or any part of it?

A. No, sir.

(Testimony of Geo. L. Marshall.)

The witness then resumed: [25] There was an old balance on the Thorsen account of \$105.00, upon which \$50.25 was paid by Mr. Sheldon; that is not credited on the account; when Mr. Sheldon asked me to bring the bills into the bank on the first of every month, he says, "When we come to your bills we may pay on the old account, and we may not, but your bill will be paid from this time on"—this was on February 11th—"will be paid from this time on the first of every month." This \$5,025 was applied on the old account and is not included in the total to which I have testified. The above is the conversation when the bill was paid to me. When I collected the first bill Mr. Sheldon said they would apply it on the first account. As I remember all the bills were paid by Mr. Sheldon. I am pretty sure that all the payments were made by Mr. Sheldon, but could not be absolutely sure of that unless I saw the receipts that were given.

Thereupon the following proceedings were had:

Q. (By Plaintiff's Counsel.) And to whom did you hand the receipts for this Thorsen account?

A. Well, Mr. Sheldon took two of them, anyhow, whether he took any more I am not sure, but I am sure he took two of them—two receipts were made to him, the rest I am not clear of. While the bills were made out and given to Mr. Sheldon the first of every month, he rung me up and told me when to come over, and then I went over and collected them and gave him a receipt.

Q. And the reason they were not paid on presen-

(Testimony of Geo. L. Marshall.)

tation was under an arrangement made with Mr. Sheldon?

A. They had to go out to the claim to be O.K.'d by the foreman out there, and then came back to the bank [26] and he gave me a check for them. That was the procedure in every one of the bills that were paid.

On cross-examination the witness testified as follows:

I don't know whether he paid me in cash or paid me in check. When he gave me the payments I don't remember whether it was in check he made out or whether he paid me in cash and deposited the check to our balance. I do not know whether it was a check signed by the Thorsen Company, that I don't remember.

Thereupon the following proceedings were had:

Q. Well, do you remember whether upon any occasion he paid you a check signed in that manner?

A. Well, no, I could not say anything more now, if it was a check whether it was signed that way or not.

Q. Now isn't it a fact that he gave you every time a check signed Thorsen Company, in payment of your bill?

A. I could not swear to that because I don't remember.

Q. Then, you don't know whether it was a check signed Thorsen Mining Company, or not?

A. No, I do not.

Alaska Banking and Safe Deposit Company. 29
(Testimony of Geo. L. Marshall.)

Q. It may have been a check signed by Thorsen Company? A. It may have been.

Q. It may have been checks?

A. It may have been.

Q. What became of the checks?

A. He has them, I presume.

Q. Have you any of the Thorsen Company checks?

A. I do not think so. [27]

Q. Were not all the payments made by Mr. Sheldon in the form of checks signed Thorsen Company, in pursuance of your arrangements with Mr. Sheldon? A. Not with my arrangement.

Q. They may have been all, however, signed Thorsen & Co.? A. They may have been, yes.

Q. You don't have any real recollection of ever having collected any one of them, have you?

A. Oh, yes, I have, because I entered them up.

Q. Aside from the entry there in your books, have you any recollection of how they were signed, or anything more than you entered the payments in your books there, on account of Thorsen & Company?

A. That is, I took the accounts and entered—the bills, or checks or money, whatever it was and entered it up in the account. That is about all I know about it; I have no very definite recollection of the transaction at all.

Q. Now, if you don't remember the kind of check you have no very distinct recollection whether or not he gave you a check or the money?

A. I do recollect something during the winter,

(Testimony of Geo. L. Marshall.)

one time his drawing a check—I think on a couple of occasions of accepting the check and depositing it with the deposits at the bank, but I don't recall just when that was.

Q. Is it not a fact that you just presume it was paid by check?

A. I know on one or two occasions he gave me the checks and of drawing upon the account there in the bank, [28] but the character or amount of the checks, or how they were signed, I have no recollection of the particulars at this time. This ledger does not show the account in the beginning, the balance is just carried forward in this ledger.

Q. Now, there is nothing in this account here to indicate where this account begins or anything where it ends?

A. No, sir, only that I know where it begins, because it is brought forward from another ledger.

Q. It is carried right along under the name of Thorsen Mining Company? A. Yes, sir.

Q. And nowhere indicates any change in the account, in the name of the account, from the beginning? A. No, sir.

Q. Nowheres indicating that there was any change in the arrangements, you say, about who were to pay for the goods?

A. Not on the account itself.

Q. No change at all but is carried right along in the same name without the introduction of any change in the name of the account whatsoever.

A. Yes, sir.

(Testimony of Geo. L. Marshall.)

Mr. ORTON.—In connection with the cross-examination of this witness, we desire to offer this account on pages showing the account in the name of "Thorsen Mining Company," commencing on the preceding pages, and continuing clear to the end of the account.

Mr. BRUNER.—We have no objection.

(Pages referred to received in evidence and marked Defendant's Ex. No. 1 and exhibited to the [29] jury.)

Mr. BRUNER.—I will ask that the last two pages be admitted as Plaintiff's Exhibits "A" and "B."

(Pages referred to marked Plaintiff's Exhibits "A" and "B," received in evidence and exhibited to the jury.)

Q. Were these goods delivered to Thorsen & Company?

A. No, they were sent down to Billy Rowe's and he sent them out to the mine.

They were sent down to Billy Rowe's on orders from the claim.

The witness thereupon identified the first item paid on account to the Pacific Cold Storage Company, being for the sum of \$93.25.

(Paper handed witness.)

Q. Is this the check that was paid by the bank for that credit? A. Yes, I should think it was.

Q. That check is signed "Thorsen Company," is it not?

A. Yes, sir, signed Thorsen Mining Company, "Sheldon."

(Testimony of Geo. L. Marshall.)

Q. Never mind; I just asked you if the check was signed Thorsen Company? A. Yes, sir, it is.

Q. Now, when this check was paid to you, you took it over to your store and deposited it along with your other checks, in the usual manner, did you not? A. In the usual manner, yes, sir.

Mr. ORTON.—We offer this check in evidence as being the check received by plaintiff Pacific Cold Storage Company in payment for goods received by Thorsen Mining Company.

(Paper referred to received in evidence [30] together with the endorsement thereon, marked Deft.'s Exhibit #2, and read to the jury as follows:

[Defendant's Exhibit No. 2—Check.]

“Nome, Alaska, Mar. 10, 1911. No. 5.
THE ALASKA BANKING & SAFE DEPOSIT CO.
Pay to P. C. S. Co. or bearer.....\$97.23
Ninety-seven and 23/100 Dollars.

THORSEN & CO.

S.

Endorsed on back: For deposit to the Credit of PACIFIC COLD STORAGE CO.”

The witness then identified the check for the next item of credit, being dated May 2d, 1911, for \$84.43; also item of credit of \$104.35; all these checks are signed in the same way.

Mr. ORTON.—I offer these checks with their endorsements in evidence.

Papers referred to received in evidence, marked Deft.'s Exhibits Nos. 3 and 4, and were as follows:

Alaska Banking and Safe Deposit Company. 33
(Testimony of Geo. L. Marshall.)

[Defendant's Exhibit No. 3—Check.]

"Nome, Alaska, 4/27, 1911. No.

THE ALASKA BANKING & SAFE DEPOSIT CO.

Pay to P. C. S. CO. or order.....\$84.43
Eighty four and 43/100 Dollars.

THORSEN & CO.
S.

Endorsed: For deposit to the credit of PACIFIC
COLD STORAGE CO."

[Defendant's Exhibit No. 4—Check.]

"Nome, Alaska, May 23, 1911. No. 19.

THE ALASKA BANKING & SAFE DEPOSIT CO.

Pay to P. C. S. Co. or bearer.....\$104.35
One hundred four and 35/100 Dollars.

THORSEN & CO.
S.

Endorsed: For deposit to the credit of PACIFIC
COLD STORAGE CO." [31]

Q. So as a matter of fact these three payments
which you have testified to were all made to you in
check? A. Yes, sir.

Q. And not in cash? A. Yes, sir.

Q. Having refreshed your recollection now by
seeing these checks you are able to say that that is
a fact? A. Yes, sir.

Q. State whether or not they were paid to you in
the same manner that other bills and taken to the
office and deposited with your other checks.

A. Yes, sir.

Q. In the ordinary course of business?

A. Yes, the same as we do everything else.

(Testimony of Geo. L. Marshall.)

Q. Mr. Marshall, you say these supplies were ordered from the claim, some by telephone, somebody from the claim would telephone and personally give the orders? A. Yes, sir.

Q. Some party, the foreman probably, from Thor-
sen Mining Company, telephones in the orders from
the claim?

A. I don't know as to that; the orders were left at
the office, after the butcher takes them.

Q. They came by telephone or somebody coming
personally from the claim?

A. I don't know whether they came personally or
not.

Q. You don't ever take orders yourself. You
don't remember of ever taking any of these orders
yourself, do you?

A. No, I don't remember but I may have taken
them; I sometimes take the orders, but I don't re-
member whether I ever took any of these particular
orders or not. [32]

[Testimony of S. W. Taggart, for Plaintiff
(Recalled).]

Mr. S. W. TAGGART, recalled by the plaintiff in
chief, testified as follows:

(Paper handed witness.)

I identify the paper handed me; this is the assign-
ment of this account to W. J. Rowe.

Paper referred to was received in evidence,
marked Plaintiff's Exhibit "C," and was as follows:

[Plaintiff's Exhibit "C"—Account Assigned to W.
J. Rowe.]

"Nome, Alaska, July 1, 1911.

M. Thorsen & Co.,

BOUGHT OF PACIFIC COLD STORAGE COMPANY,

General Cold Storage, etc.

Feb.	11.	Mutton	54	13.50
	17.	Hind 1/4 Beef	149	33.53
Mar.	7.	Fore 1/4 "	189	42.53
	14.	Mutton	47	11.75
	30.	Hind 1/4 Beef	134	30.15
Apr.	7.	Mutton	45	11.25
	17.	Fore 1/4 Beef	170	38.25
		1 cs. eggs		12.50
	22.	Mutton	41	10.25
	25.	Hind 1/4 Beef	145	32.63
May	8.	Fore 1/4 "	179	40.28
		Mutton	58	14.50
	17.	Hind 1/4 Beef	133	29.93
		Mutton	53	13.25
	23.	Fore 1/4 Beef	198	44.55
	29.	Mutton	52	13.00
		1 cs. eggs		12.50
	31.	Bacon	34	15.30
		Butter	8	4.00
		Hind 1/4 Beef	160	36.00
June	5.	Fore 1/4 "	142	31.95
		Bacon	39	15.60

(Testimony of S. W. Taggart.)

June 10.	Hind $\frac{1}{4}$ Beef	156	35.10
12.	" "	177	39.83
17.	Fore $\frac{1}{4}$ "	159	35.78
	Mutton	43	10.75
23.	Hind $\frac{1}{4}$ Beef	162	36.45
			665.11
Mar. 9.	By Cash on a/c Feby.	47.03	
May 2.	" Mar.	84.43	
July 3.	Beef ret'd 75	16.87	252.68
23.	" Apr.	104.35	
	Balance due		412.43

For value received the above and foregoing account is hereby assigned to W. J. Rowe. [33]

PACIFIC COLD STORAGE CO.

S. W. TAGGART, Mgr.

Dated Nome, Alaska, July 17th, 1911."

Q. Did you have any conversation with Mr. Sheldon with reference to the balance of the account, of this account? A. I did.

Q. When did you have that conversation?

A. The last conversation I believe was the middle of June, about the middle of June, sometime.

Q. And at that conversation—did it have reference to the account of the Thorsen Mining Company?

A. Entirely.

Q. After February 11th, what was your reason for continuing the account in the name of Thorsen Company?

A. Because there was a balance on the old account, and which they promised to take up at times when

(Testimony of S. W. Taggart.)

they could do so as they went along.

Q. A balance of what?

. A. A balance on February 11th of some hundred dollars, which they promised to pay along with the bills for goods which were ordered at a time subsequent to February 11th, and they did pay some fifty-eight dollars on the old account.

Q. Was that your reason for continuing the account in their name?

A. That was one reason, yes, sir.

Q. Was there any other reason?

A. To keep track of the account, and as much as anything else in order to give them the benefit—beef is sold [34] by the quarter—front and hind, and we wanted to give them the benefit of their previous purchase, and give them the hind quarters as they would have gotten on their old account—for instance, a new account is opened up we usually begin the account with the fore quarter, to start with, and inasmuch as the hind is worth more than the front, we wanted to give them the benefit of their previous purchases, and on that account, to keep track of the account, and on account of this old balance which they promised to pay, that it would be paid as we went along.

Q. Did you have any conversation with Mr. Sheldon with regard to the delivery of goods to Thorsen Company? A. I did.

Q. When—at about what time?

A. About February 11th.

Q. What was the conversation you had with Mr.

(Testimony of S. W. Taggart.)

Sheldon in reference to the delivery of goods to Thorsen Company.

A. Mr. Sheldon came up to the Pacific Cold Storage Company's office and informed me that he had taken a mortgage on the Thorsen & Company outfit, on the dump that they had already taken out and whatever there was to be taken out, and we should furnish them with anything that they required, bring the bills to the bank "And I will pay them."

On cross-examination the witness testified:

That was about February 11th (referring to above conversation); somewhere about that time we reached [35] the understanding; the deal had been on for a week or so, and I would not state that any one of these conversations occurred at any one particular time, because there were several different conversations took place at several different times, and I won't state the particular date of any one of them. The closest I can get is that it was about the 11th of February. I did not say that I had all these conversations with Mr. Sheldon over the telephone, because I did not. I would not segregate the conversations because I don't remember them apart.

Thereupon the following proceedings were had:

Q. Now, you testified this morning that Mr. Louis Stevenson guaranteed a certain mutton, didn't you?

A. Yes, sir.

Q. And did Mr. Stevenson pay for it?

A. No, sir.

Q. And is that included in this bill here?

A. Yes, sir, I think it is.

(Testimony of S. W. Taggart.)

Q. Why did you include this in this bill if it was prior to this conversation you have detailed.

A. Because they had to eat in the meantime, you see, while this investigation and experting of the mine was taking place, and this mutton Mr. Stevenson said if the bank didn't pay for it, if the deal didn't go through, and if the bank didn't take the mortgage that he would personally pay for it himself.

Q. So as a matter of fact this mutton was furnished to Thorsen Company, sold to them, prior to the time of this conversation wherein Mr. Sheldon said to you "I will pay for it"? A. Yes, sir.

[36]

Q. Or words to that effect? A. Yes, sir.

Q. Now, after February 11th you continued to charge off the goods delivered to Thorsen Mining Company up in your books in the usual manner, did you not? A. Yes, sir.

Q. You made no segregation of the account at all?

A. No, sir.

Q. Of course, you naturally expected Thorsen Mining Company to pay, didn't you? A. No, sir.

Q. You didn't expect them to pay you?

A. No, sir, I did not expect the Thorsen Mining Company to pay us.

Q. Well, now, Thorsen & Company did pay you on the first of each month, did they not, gave you their check on the first of every month, did they not?

A. After the February bill?

Q. Yes, after the February bill Thorsen & Com-

(Testimony of S. W. Taggart.)

pany paid you with their own check, did they not?

A. No, sir, they did not; the Alaska Bank paid us.

Q. But they were signed by the Thorsen Mining Company were they not?

A. Yes, they were signed by the name of Thorsen Mining Company, by Sheldon, they were written by Sheldon—

Q. —Signed by the Thorsen Mining Company?

A. Yes, sir.

Q. Well, now, you knew it was their check?

A. No, sir, I did not; it was written by Joe Sheldon.

Q. Well, you know that of course while Mr. Sheldon may have written the checks they were signed by Thorsen [37] Mining Company, and were their checks?

A. No, sir, I don't know anything except what I have been told.

Q. You say you saw one check? A. Yes, sir.

Q. You didn't look at it, of course, and you don't know whether they were Thorsen checks or not?

A. I know that so long as the bank was responsible I didn't pay any attention to how the checks were signed. I know the checks have been received and we have received credit at the bank. I didn't go over every individual check as to how the payments were made.

Q. But you never released Thorsen & Company from the payment of these bills?

A. I never considered that Thorsen & Company owed me a cent.

(Testimony of S. W. Taggart.)

Q. Why did you charge them to them?

A. Well, I never looked the record over.

Q. All you know is that the bills were paid?

A. Yes, sir.

Q. And that you got them out of Thorsen Company?

A. I don't know who they came out of; the book-keeper made out the bills.

Q. Then, you don't know very much about these bills of your own knowledge, do you?

A. He makes out the bills—that is his business to make out the bills and collect them.

Q. Well, the same with Thorsen & Company as others, did he make out the bills and collect them?

A. Yes, sir, that is as far as I know. I don't know anything [38] more about bills that are paid. I know when they are not paid however. I keep track of those bills very closely; in fact, there is a list made out every morning and put on my desk, if not I go to the ledger and find out what bills are paid—but I don't have even to do that because this list is made out and on my desk at a certain time every month, and any bills that are not paid I go over them and see they are paid.

Q. Was Thorsen Company on this list?

A. Yes, sir.

Q. Now, you say the Alaska Bank paid some of this old balance?

A. Paid fifty dollars, something like that, on the old balance.

Q. When?

(Testimony of S. W. Taggart.)

A. When the first payment was made after the arrangement. The old balance was something in the neighborhood of one hundred dollars, I believe.

Q. What business was Mr. Sheldon doing about that time—he was cashier of the bank, was it not?

A. I do not know anything only that he was in charge of the bank.

Q. You have bought drafts signed "J. V. Sheldon, cashier," have you not?

A. I have never bought more than two or three drafts at the bank, maybe three or four. I have bought drafts and exchange for the company, but I have had nothing to do with the bank personally, at all.

Q. Well, you have bought two or three? [39]

A. I may have bought one or two small drafts.

Q. And they were signed "J. V. Sheldon, Cashier," were they not?

A. I would not swear how they were signed.

Q. Well, you know that he was cashier of the bank, do you not? A. Yes, sir.

On redirect examination the witness testified:

(By Mr. BRUNER.)

Q. What, if anything, do you know about who was in charge of the bank's affairs?

A. I know absolutely nothing about him, only that he was manager and cashier, or what he was, only inasmuch as he was running the bank, and that was all I did know.

Q. Well, what I mean is, so far as any other person that you did business with at the bank, with re-

(Testimony of S. W. Taggart.)

gard to any affairs except him? A. That was all.

Q. Mr. Sheldon was the only person, was he?

A. Yes, sir, that is all.

Q. Was there any other person in the bank to do business with except him?

A. I never talked this over in the bank; it has all taken place in our own office until after this question arose. Since then we have discussed it in the bank several times.

Q. Now, you was asked with regard to this first bill, which was made before the final arrangement, before you had the conversation with Mr. Sheldon with regard. [40] to his paying the bills. Was that in relation, or did it have relation to the Thor-sen bill?

A. This first bill, when this first mutton was included that was the first payment. I believe the first payment was made for Mr. Stevenson's order, which the bank paid.

On recross-examination the witness testified:

(By Mr. ORTON.)

Q. When you say the bank paid it you mean that you were paid by the checks that were offered in evi-dence, that is what you mean, is it not?

A. Why paid at the bank.

Q. You don't know who paid it?

A. No, I know that it has been paid. I know that we received three payments; I know that.

The payments were by the three checks that have been introduced in evidence. I know Mr. Bryant; he is the general manager of our company. He was

(Testimony of S. W. Taggart.)

in Nome, in the month of June. I remember an occasion when Mr. Bryant, Mr. Sheldon and Mr. Thatcher and myself were together in the office of the Alaska Banking & Safe Deposit Co., some time in the month of June, and we had a conversation with reference to this matter.

Q. Is it not a fact that you stated at that time in the presence of Mr. Sheldon, Mr. Thatcher and Mr. Bryant that you did not know anything about the matter personally?

A. No, sir, I never made that statement because I knew a good deal about it. [41]

Q. Did you not state in substance and effect at that time that you had never had any conversation personally with Mr. Sheldon with regard to who was to be responsible for this bill?

A. No, sir, I never did.

Q. Did you not state in substance, at that time, and in the presence of Mr. Bryant, Mr. Sheldon and Mr. Thatcher, that you never had any conversation with Mr. Sheldon about it, that whatever was done about it was done by Mr. Marshall?

A. No, sir; I never did.

On re-direct examination the witness testified:

(By Mr. BRUNER.)

Q. In regard to this Stevenson bill—let me ask you, did you have any conversation with Mr. Sheldon with regard to Mr. Stevenson's bill, and the way it was ordered?

A. Yes, sir; I phoned to Mr. Sheldon about it.

Q. State what was said in reply by Mr. Sheldon.

(Testimony of S. W. Taggart.)

A. I told him that Louis Stevenson had explained to me that they were going to expert the mine, and in the meantime he was going to order this mutton for the company, and if the bank didn't pay it, he would. Mr. Sheldon said, "Go ahead and give him the mutton and it will be taken care of by the bank, any way."

(By Mr. ORTON.)

Q. Why did you do that? Were you not satisfied with Mr. Stevenson, wasn't Mr. Louis Stevenson good for this mutton—wasn't Mr. Stevenson's word or credit good for that much credit? [42]

A. I am not sure but what I called up—I would not be just positive that I called up, or why if I did I called up. I am not positive about that now.

Q. You were not satisfied, then, with Mr. Louis Stevenson's guarantee?

A. It was in reference to further credit.

Q. Then it was not in reference to this mutton you are speaking about now that Mr. Louis Stevenson guaranteed?

A. I was absolutely satisfied with Mr. Stevenson's guarantee, but there was something else in connection with the business we talked about at the same time.

(Witness excused.)

[Testimony of W. J. Rowe, on His Own Behalf.]

Mr. W. J. ROWE, plaintiff, being duly sworn testified as follows:

Direct Examination.

(By Mr. BRUNER.)

I am a teamster and dealer in lumber also. I know the Thorsen Mining Company. I commenced doing business with them about two years ago, and continued to do their hauling work and so on until some time in the month of January, 1911, this last January, and at that time their bills went up to something like \$386, which were not paid, and I came in one afternoon and there was an order for a load of coal amounting to some seventy or eighty dollars, and I shut down the credit of the Thorsen Mining Company at that time. About a week or so after that I went up to the Alaska Bank and I told Joe Sheldon that I had shut down on the Thorsen Mining Company, and that I was going to attach them, and he said it wouldn't do me any good [43] because they had a mortgage signed by the Thorsen Company, but he said that possibly in a little while he would be able to take care of my account with the Thorsen Mining Company. In the mean time one of the Thorsen Mining Company came along and paid for a load of coal, cash. The next load Mr. Stevenson guaranteed. I went into the Alaska Bank a few days after that and Joe Sheldon told me to bring my bills in to him from that time on and he would pay them; that was in February, I don't know exactly the date, but about somewhere along about the first of March, finally,

(Testimony of W. J. Rowe.)

the first of March I took in my bill and I left it there for a few days, for probably a week, and then I went in and got my money for the Thorsen Mining Company account from Mr. Sheldon in the Alaska Bank.

Q. What instructions, or what directions, if any, were given you by Mr. Sheldon as to the deliveries that were delivered after that time?

A. Previous to that time or after?

Q. No, after that time.

A. He told me at the end of the month I should take the bills into the bank and he would pay them, and also pay what he could on the previous back bill which I was going to attach them for. He then paid one bill to myself, and paid the two for the following months, I think, to the bookkeeper. The third bill was paid, but the fourth month was not paid.

Mr. BRUNER.—I now offer Plaintiff's Identification "A" in evidence.

Mr. ORTON.—To which we object on the ground that it is incompetent, irrelevant and immaterial and [44] not binding upon the bank.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff then and there excepted, and an exception was allowed.

[Recital Concerning Plaintiff's Identification "A."]

Said Plaintiff's Identification "A," so offered, as aforesaid being a Chattel Mortgage from H. Thorsen et al. to the Alaska Banking & Safe Deposit Co., and hereafter set out in full as Plaintiff's Exhibit "D." [45]

The witness then resumed: I had no further conver-

(Testimony of W. J. Rowe.)

sations with Mr. Sheldon with reference to the Thorsen Mining Company, from the time I talked to Joe Baumgarten who was in charge of the mine.

The only bookkeeper I have is Charles Milot, and I am not as familiar with the books as he is. My account against the bank is for hauling, lumber, coal and crude oil, about \$300 is for hauling, the balance of the account was for oil and coal. One of the payments was made to me personally by Mr. Sheldon, and there were several payments made to Mr. Milot, my bookkeeper.

On cross-examination the witness testified:

(By Mr. ORTON.)

I had an account in my books against the Thorsen Mining Company; had an account with them for about a year and a half—it was a running account.

Q. Now, at this time you claim to have had this conversation with Mr. Sheldon, you kept right on doing hauling for the Thorsen Mining Company?

A. No, sir, not until Mr. Sheldon said he would pay the bills the first of every month.

Q. And you said you would continue to furnish them with such supplies and hauling as before?

A. Yes, after Mr. Sheldon promised to pay the bills.

Q. Now, when was that?

A. Sometime in February, 1911.

Q. And after that you continued the account and it then ran right along the same way in the name of the Thorsen [46] Mining Company?

A. Yes, sir.

(Testimony of W. J. Rowe.)

Q. Continued to do hauling for them on credit?

A. No.

Q. Well, you furnished them goods on credit the same as you had theretofore?

A. No, sir, we shut down their credit.

Q. That was after this conversation with Mr. Sheldon? A. Yes, sir.

Q. You then furnished them with goods on credit, and to do hauling for them on credit, the same as you had theretofore done, did you not?

A. With the promise of Sheldon, we promised to furnish them credit for thirty days. Previously I had been only giving them two weeks' credit.

Q. Mr. Sheldon guaranteed their credit for thirty days?

A. He told me to bring the bills to the bank and the account would be paid the first of every month.

Q. After this conversation you had with him then you continued to do hauling for them and furnish them goods on credit for thirty days—Thorsen Company? A. Thorsen Company, no.

Q. I say you continued to furnish them goods, Thorsen Mining Company, on credit, they didn't pay cash, did they for the goods after that?

A. No, sir, absolutely no; not on Thorsen Company's credit.

Q. Well, they didn't pay cash after that time for what goods they got, did they?

A. Yes, I was paid at the end of the month from Joe Sheldon, for the next two months.

Q. So Mr. Sheldon extended their credit from two

(Testimony of W. J. Rowe.)

weeks [47] to thirty days, did he?

A. No, sir, not with me, not one hour.

Q. Isn't that what you said a moment ago?

A. No, sir.

Q. Did you not testify in your deposition as follows: (Reads:) "Q. You never charged anything in your books to the Alaska Banking & Safe Deposit Company, did you? A. No, sir. Q. Never made an entry in your books of account against them, did you? A. Oh, yes, we have several entries against them. Q. I mean against this account? A. No."

Q. Now, I will ask you, Mr. Rowe, if you have any entry on your books against the Alaska Banking & Safe Deposit Company?

A. Yes, sir, as I stated there we have several entries against them.

Q. On this account?

A. No, not directly in their name.

Q. Well, you have no account against the bank of any kind on this account? A. No.

Q. Of course, you sometimes hauled a load of coal or hauled assay supplies to the bank, something of that sort? A. Yes, sir.

Q. Hauling the same manner you do for almost everybody about town? A. Yes, sir.

Q. When I refer to an entry in your books against the bank I am not speaking of anything save in connection with the Thorsen Mining Company account. Now, you [48] have never made an entry in your books against the Alaska Banking & Safe Deposit Company, in connection with this Thorsen account?

(Testimony of W. J. Rowe.)

A. No, sir.

Q. Now, when your deposition was taken in this case I will ask you if you testified as follows (reads): "Q. Have you an account on your books for any merchandise sold the Alaska Banking & Safe Deposit Company? A. No, not directly. Q. Have you an account with the defendant, the Alaska Banking & Safe Deposit Company? A. Not with the bank; the account of \$384.00, it was guaranteed by the bank." Did you make that answer? A. Yes, sir.

Q. (Reads:) "Q. You have an account on the books for goods sold to the Alaska Banking & Safe Deposit Company? A. No, not directly, but to Thorsen & Company. Q. Have you an account on your books for merchandise sold the Alaska Banking & Safe Deposit Company? A. No, not directly. Q. Do your books show anything to them indirectly? A. They don't show it in the name of the Alaska Banking & Safe Deposit Company. Q. Your books don't show you sold anything to the Alaska Banking & Safe Deposit Company? A. No." Did you make those answers to those questions?

A. Yes, sir, I made those answers.

Q. Did you make these answers to the following questions (reads:) "Q. Who did you talk to there" (referring to the Alaska Banking & Safe Deposit Company)? A. Joe Sheldon. Q. When was that? A. In February, a Saturday afternoon, I don't remember the date. Q. Saturday [49] afternoon, I don't remember the date. Q. Saturday afternoon? A. Yes. Q. State what was said to you then of the

(Testimony of W. J. Rowe.)

Thorsen outfit. A. Nothing more than I had said I wasn't going to carry them any longer. Q. What did he say? A. He said, 'We are going to protect you business men and take care of the bills of the Thorsen Mining Company from now,' and he also said he might pay the back account, but he asked me at that time to charge the back bill; he said he might take care of the back bill, but that he wouldn't promise that. Q. That was all that was said, was it? A. Yes, to my knowledge." Did you answer those questions in that way? A. Yes, sir.

Q. Now, on the next page of your deposition (reads): "Q. You don't know what time in February, that was? A. No, I don't know the date except I think I could tell by looking at the bills. Let me see, this Thorsen one—this was paid here (indicating January 29th) I know it was some time in February, I know it was in February, I am confident of that by the bills. Q. You have stated all that occurred between you and Mr. Sheldon, at that time, have you? A. Yes, that's about all." Did you answer that question in that way?

A. Yes, I answered that way. I knew it was the Thorsen Mining Company and not the bank that was operating this mine out there. I have given above all the conversation I recollect that I had with Mr. Sheldon.

Q. (Reading from deposition:) "And you have given all the conversations you ever had with any one representing [50] the bank with reference to contract or payment?"

(Testimony of W. J. Rowe.)

A. All that I said, that he agreed to take care—Joe Sheldon agreed to take care of the business men furnishing anything—oh, I might have had several little conversations, more or less, no agreement at all.” Did you make those answers to those questions? A. Yes, sir.

Q. Now, after Mr. Sheldon had this conversation with you, the Thorsen Mining Company went right along and ordered things in the same way—now—who ordered the goods?

A. Well, Gus. Lynell, most of the time, sometimes different parties.

Q. You filled the orders, did you? A. Yes, sir.

Q. And charged them to the Thorsen Mining Company on your books? A. Yes, sir.

Q. And, of course, you naturally expected Thorsen and Company to pay you, didn’t you? A. No, sir.

Q. You did not?

A. No, sir; I expected Mr. Sheldon to pay them. I shut down on Thorsen Company’s credit previous to that.

Q. And you never looked to anybody else at all for this money? A. No, sir, I did not.

Q. Now, didn’t you testify in your deposition that if Thorsen and Company had paid you a thousand dollars you would have stood the balance of the loss yourself and would not have looked to the bank?
[51]

A. Thorsen and Company never promised to pay me a thousand dollars.

I don’t know of my own knowledge that Baum-

(Testimony of W. J. Rowe.)

garten represented the bank at the mine. He told me he represented the bank. All I know about him representing the bank is what he and other people told me. I went out to the mine about getting my money. I knew that was not the office of the bank where they paid out money.

Q. Mr. Sheldon was the man that you claim had promised that he would take care of the bills?

A. Yes, sir.

Q. And notwithstanding that you went out to the mine to see if you could get your money, to try and get your money?

A. After Mr. Sheldon refused to pay them, I did.

Q. Did you ever demand your money from Mr. Sheldon? A. No; my bookkeeper did.

Mr. ORTON.—Move to strike out the answer, except the last part, except "No, sir," as it is not responsive.

The COURT.—Motion sustained.

To which ruling of the Court plaintiff duly excepted and an exception was allowed.

Q. I asked you if you ever demanded your money from Mr. Sheldon?

A. No, not at that time. I never demanded my money; no.

Q. At that time you had not demanded your money from the bank?

A. No, sir, I had not. When I went out to the mine I found Joe Baumgarten in possession of the claim, and afterwards he [52] promised to pay me one thousand dollars on account. When I first

(Testimony of W. J. Rowe.)

went out to the mine Baumgartner promised to pay me something on account, subsequently he promised to pay me one thousand dollars.

Q. But at that time, of course, you didn't look to anybody but the bank for your money?

A. Well, I was looking to the bank or their agent.

Q. But you didn't look to anybody but the bank or somebody representing the bank? A. No, sir.

Q. Didn't you testify at the time your deposition was taken, as follows (reads) : "If they had paid me that thousand dollars I wouldn't have brought suit?"

A. I did.

Q. Notwithstanding the fact that you never looked to anybody but the bank and that they owed you, or you claimed that they owed you about seventeen hundred dollars, if they had paid you a thousand dollars you would never have said anything more about it?

A. That is the idea; yes, sir. A considerable amount of my claim is for oil delivered in drums. I paid Sesnon Company for this oil myself.

Q. Why was it, Mr. Rowe, that you were willing, if you never held anybody else responsible for this account except the bank, that you were willing to take a thousand dollars, so much less, than your whole account?

A. I figured that the attorneys would get the balance and I might as well divide it up with the bank as to give it to the lawyers. [53]

Q. Is that your only reason?

A. That is about the only reason; yes.

Q. You were very friendly with them at the time,

(Testimony of W. J. Rowe.)

were you not? A. Yes.

Q. Now, you say Joe (Sheldon) had promised to pay this? A. Yes, he did.

Q. You have never even demanded it, have you?

A. I never knew until last week that it was necessary, and from the way the whole thing ended I didn't know as it would do any good, anyway.

Q. You never even talked the matter over with them that you were willing to take this thousand dollars, at any time?

A. No, sir, I never made any demand.

Q. But you never spoke even to the bank that you were willing to take a thousand dollars—just went ahead and brought suit against them?

A. I brought suit, yes, sir.

Q. Of course, if you could have collected it from Thorsen Company you would have taken the full amount, would you not?

A. I certainly would, yes, sir.

Q. And would even now?

A. I would be tickled to death to.

Q. You testified, I believe, that these payments were made to you by Mr. Sheldon, did you not?

A. Not all of them; no.

Q. Who else made any besides Mr. Sheldon?

A. Oh, yes, Mr. Sheldon made the payments to me, yes, sir. [54]

Q. Pay them in cash?

A. Well, I rather think not; I ain't clear on that.

Q. Well, if he didn't pay you in cash, how did he pay you? A. By a check.

(Testimony of W. J. Rowe.)

Q. Whose check, do you know?

A. His own—well, I really don't know whether there was a check or cash.

Q. Did he make payments to you personally?

A. One of them; yes, sir.

Q. When was that?

A. Oh, sometime in March.

Q. Was that paid to you in check or in cash?

A. I ain't sure about that.

The witness thereupon identified paper handed to him as being a check paid to him on the account of Thorsen Mining Company.

Q. Now, Mr. Sheldon paid you by checks signed Thorsen Mining Company, didn't he?

A. Yes, sir.

Mr. ORTON.—We offer this check in evidence as being the check paid to Mr. Rowe, together with the endorsements thereon.

(Paper referred to received in evidence and marked Defendant's Exhibit No. 5, being as follows:)

[Defendant's Exhibit No. 5.]

"Nome, Alaska, Mar. 11, 1911. No. 6.

THE ALASKA BANKING & SAFE DEPOSIT
CO.

Pay to W. J. Rowe, or bearer \$305.00 Three hundred five and no/100 Dollars.

THORSEN & CO.

S.

Endorsed: W. J. ROWE." [55]

There were two other payments but they were not made to me personally.

(Testimony of W. J. Rowe.)

On redirect examination the witness testified as follows:

When I testified that I knew it was the Thorsen Mining Company and not the bank operating out there, I referred to the time I was going to attach them, that was the latter part of January or the first part of February. I continued the account in the name of the Thorsen Mining Company, for the reason that the account was running that way, and it didn't seem necessary to change it, and also as the Alaska Bank had a private account on my books.

Q. After you stopped the credit of the Thorsen Company, did you ever at any time after that extend any credit to the Thorsen Company?

Mr. ORTON.—That is objected to as incompetent, irrelevant and immaterial, and not the proper way to prove accounts, and calls for a conclusion of the witness.

The COURT.—I think the witness may state the facts and allow the jury to draw their conclusions from the facts; this question calls for simply a conclusion of the witness.

A. No, sir, I did not.

Mr. ORTON.—Your Honor sustained the objection to the last question and I would ask that the answer of the witness be stricken out.

The COURT.—It may be stricken out.

To which ruling of the Court the plaintiff [56] duly excepted and an exception was allowed.

Q. Did you, after that time in January that you have spoken of, did you extend any credit to the

(Testimony of W. J. Rowe.)

Thorsen Mining Company?

Mr. ORTON.—I understand your Honor has just this minute stricken that out. We object on the same grounds.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff duly excepted and an exception was duly allowed.

At the time I went out to the mine and had this conversation with Mr. Baumgarten my bills had been presented to Mr. Sheldon, but they have not been paid; if they had paid me a thousand dollars I would not have commenced suit.

In my deposition I testified that Baumgarten promised to pay me a thousand dollars, but he said he had no money or authority to pay me that sum. He stated he had paid the money out for labor. If they had paid me that thousand dollars I wouldn't have brought suit, I would have stood the loss of the rest—I testified to that.

On recross-examination the witness testified:

I testified when my deposition was taken that the Thorsen bill was the only one that I had had trouble about, but that I didn't consider that a loss as yet.

Q. Why did you use that expression, "I said the Thorsen bill was the only one I had trouble with"—you never had any trouble with the bank over it, had you?

A. Well, the trouble I referred to I had shut down on their credit; that was the only trouble I had; that [57] had nothing to do with this trouble, of course.

Q. What did you mean by "You didn't consider

(Testimony of W. J. Rowe.)

that a loss yet." You knew, of course, any loss was good for would be paid, didn't you?

A. Well, I never believed there would be a loss; no.

Q. Now, you were hoping, of course, that in the course of time Thorsen Company would pay, and that you would not lose any money, because you knew, of course, there would be no trouble with the bank, that the bank would pay?

A. If it was paid, I would rather, of course, that Thorsen Company had paid instead of the bank.

Q. You were hoping that the deal with Thorsen Company, would turn out all right, knowing that if it didn't you would never be paid, because they were the parties you were doing business with; isn't that the fact?

A. No, I was not losing any sleep over that.

Q. You were hoping that were you not, all the time?

A. No, sir, I was not hoping anything of the kind.

On re-direct examination, the witness testified: I had trouble with the Thorsen Company about that prior bill at the time I shut down on them, a prior account of \$384 or \$386, that is not included in this suit. That is still due and unpaid.

On re-recross-examination the witness testified:

That account runs right along on the books. Sheldon didn't promise he would pay the previous bill; there is no real segregation of the account. [58]

[Testimony of Joe V. Sheldon, for Plaintiff
(Recalled).]

Mr. JOE V. SHELDON, recalled by the plaintiff, testified as follows:

Direct Examination.

(By Mr. BRUNER.)

Q. Mr. Sheldon, you conducted certain negotiations in reference to the Thorson Company account with Mr. Rowe, and Mr. Taggart, did you not?

A. How do you mean?

Q. You had business connections with them in regard to it?

A. Otherwise than Billy came in to see me once.

Q. Well, you had some negotiations with them concerning this matter once anyhow, did you not?

A. You would not call them negotiations; no.

Q. Did you have any business connection with the Thorsen Mining Company? A. Yes, sir.

Q. Did you have conversation with Mr. Taggart with reference to supplying merchandise to Thorsen Mining Company? A. I don't think so.

Q. Will you say that you did not?

A. He once told me that he (Taggart) never had any with me—

Q. I will ask you if you will say that you did not have any talk with him in regard to that.

A. I don't think I did. I did not go to Mr. Taggart's office in the month of February in reference to the Thorsen Mining Company's affairs; the bank had an account with the Thorsen Mining Company. On behalf of the bank I negotiated a mortgage from

(Testimony of Joe V. Sheldon.)

the Thorsen Mining Company, and signed [59] the mortgage on behalf of the bank, and caused it to be filed for record in the Recorder's Office.

Q. At that time did you know that Mr. Taggart and Mr. Carleton and Mr. Rowe, had refused further credit to the Thorsen Company?

Mr. ORTON.—That is objected to as incompetent, irrelevant and immaterial, and not binding upon the bank.

A. I don't know whether it was prior to that date or whether it was after that date or not.

Q. I didn't ask you about the dates. I asked you if it was about that time.

A. I would not say whether it was or was not—there was a mortgage prior to that time, however.

There was a mortgage prior to that made *made* by the same people, and it was taken up when this new one was issued; that is, the original mortgage is included in this one, the first mortgage was taken in December.

Mr. BRUNER.—I now offer the mortgage itself in evidence. It is offered in evidence to show the purpose for which this mortgage was given, how it was given, and to show the authority Mr. Sheldon had with regard to the bank's affairs.

Paper referred to was thereupon received in evidence, marked Plaintiff's Exhibit "E," and was in words and figures as follows, to wit:

[Plaintiff's Exhibit "E"—Mortgage.]

"53543.

THIS MORTGAGE, made this 16th day of Feb-

ruary, 1911, between H. THORSEN, P. O. OLSEN,
GUST LYNELL, DAN ANDERSON, ARVID
AKESSON, GUS BJORNSTAD and GUS JOHN-
SON, all of Nome, Alaska, the mortgagors, and
ALASKA BANKING & [60] SAFE DEPOSIT
COMPANY, a corporation, doing business at Nome,
Alaska, the mortgagee,

WITNESSETH:—That the said mortgagors hereby mortgage and make over to the said mortgagee all the following described personal property, now situate and being on the Lawrence Placer Mining Claim, in Cape Nome Precinct, District of Alaska, to wit: 2 16 h.p. boilers, 1 hoist, 12 cars, 1800 ft. rails, 50 points and 1500 ft. pipe; and also all the right, title and interest of the said mortgagors in and to the said mining claim, the same being a leasehold interest, and also all dumps of gold bearing earth or gravel now upon said mining claim or which shall hereafter be hoisted or placed thereon.

As security for the payment to the said mortgagee of the sum of six hundred dollars, with interest thereon, evidenced by two certain promissory notes in the words and figures following, to wit:

\$500.00 Nome, Alaska. 12/17/1910.

On or before 6/15/11 after date, without grace, for value received, We jointly & severally promise to pay to the ALASKA BANKING & SAFE DEPOSIT COMPANY, or Order, at the banking house of said bank in the City of Nome, Alaska, the sum of Five hundred and no/100 Dollars, with interest thereon at the rate of one per cent per month from date until paid, principal and interest payable only

in United States gold coin. And if suit shall be commenced for the recovery of any amount due upon this note, we agree to pay as attorney's fees thereon such additional sum as the Court may adjudge reasonable.

The maker and all endorsers hereof, and each and every party to this note, severally waive presentment [61] and demand for payment, protest and notice of protest, and notice of non payment of this note.

No. 5019.

Signed: H. THORSEN.

P. O. OLSEN.

By H. THORSON,

Atty. in Fact.

DAN ANDERSON.

ARVID AKESSON.

GUS BJORNSTAD.

GUS JOHNSON.

C. CHRISTIANSON.

H. LARSEN.

R. BURNETT.

By R. BURNETT,

Agt. in fact.

\$100.00

On demand, after date, without grace, for value received, We jointly & severally promise to pay to the ALASKA BANKING & SAFE DEPOSIT COMPANY, or order, the sum of One Hundred and no/100 Dollars, with interest thereon at the rate of one per cent per month from date until paid, principal and interest payable only in United States Gold Coin. And if suit shall be commenced for the

recovery of any amount due upon this note, We agree to pay as Attorney's fees thereon such additional sum as the Court may adjudge reasonable.

The maker and all endorsers hereof, and each and every party to this note, severally waive presentment and demand for payment, protest and notice of protest, and notice of non-payment of this note.

No. 5039.

Signed: GUS LYNELL.

H. THORSEN.

PETE OLSEN.

And also to secure the payment of such other and further sums of money as may be hereafter loaned or advanced by the mortgagee to the mortgagors, or any of them, during the continuance of this mortgage, not to exceed the sum [62] of two thousand dollars, exclusive of the sums mentioned in said promissory notes.

And the said mortgagors hereby covenant and agree with the said mortgagee that they are the sole owners of the property above mentioned and in the following proportions, namely, H. Thorsen 2/9, P. O. Olsen 2/9, Gust Lynell 2/9, Dan Anderson 1/12, Arvid Akesson 1/12, Gus Bjornstad 1/12, Gus Johnson 1/12, and that the same is free and unincumbered of or by any lien, mortgage, or pledge of any kind, except only a certain mortgage, dated December 17, 1910, executed and delivered to the said mortgagee; and said mortgagors further covenant and agree that they will work and mine the said mining claim steadily and continuously and in a careful and minerlike manner until the expiration of the term

of the lease aforesaid and that they will in all respects fully and faithfully comply with all the provisions of said lease; and they further covenant and agree that they will keep the said property and premises free and unincumbered of or by any liens or liens of laborers, miners, or materialmen, during the continuance of this mortgage; and that all gold and gold dust which shall be mined or extracted from the said premises, except royalty due the owner thereof, shall be at once paid and delivered to said mortgagee until the sum above mentioned shall be fully paid; and they do further agree that the agents and representatives of the mortgagee shall at all times have the right to enter upon and into all parts of said mining claim and to prospect and sample all earth and gravel in any and all dumps, shafts, drifts and stopes thereon or therein.

It is agreed and provided that the personal [63] property above mentioned shall remain in the possession of the mortgagors until default be made hereof, but that in case of default of any of the acts or things above agreed to be done or performed by the mortgagors, then the mortgagee may at once enter into the possession of the said property and of all drifts, shafts, stopes, and all parts of the *the* said mining claim, and may continue to work and mine the same and to wash and to sluice all dumps now thereon or which shall hereafter be mined, extracted or hoisted, and for such purposes the said mortgagors do hereby appoint the mortgagee their true and lawful attorney, with full power and authority to act in the premises; it is also agreed and

provided that in case of default in the payment of aforesaid principal sum or interest, or any part thereof, or of default in any of the matters above specified, then, at the election of the mortgagee, the United States Marshal, for the District of Alaska, Second Division, may sell the property aforesaid, or any part thereof, in the manner provided by law and from the proceeds of such sale pay the amounts due under this mortgage, including costs and attorney's fee, and return the overplus, if any, to the said mortgagors, and the said mortgagors do hereby authorize and empower the said Marshal to make such sale, in case of such default, or the mortgagee may otherwise foreclose this mortgage and sell the said property in any manner provided by law.

IN WITNESS WHEREOF, the said mortgagors have hereunto set their hands and seals the day and year first above written. [64]

H. THORSEN.	(Seal)
GUS BJORNSTAD.	(Seal)
ARVID AKESSON.	(Seal)
DAN ANDERSON.	(Seal)
GUS JOHNSON.	(Seal)
PETER OLSEN.	(Seal)
GUST LYNELL.	(Seal)

Signed, sealed and delivered in the presence of:

Miss MARY ANDERSON.
F. E. FULLER.

District of Alaska,
Cape Nome Precinct,—ss.

THIS CERTIFIES, that on this 20th day of February, 1911, before me, the undersigned, a Notary

Public, in and for the District aforesaid, duly commissioned and qualified, personally came the within named H. Thorsen, P. O. Olsen, Gust Lynell, Dan Anderson, Arvid Akesson, Gus Bjornstad, and Gus Johnson, to me known and known to me to be the same persons named in and who executed the foregoing and within mortgage, and acknowledged to me that they executed the same freely and voluntarily.

Witness my hand and notarial seal the day and year first above written.

[Notarial Seal]

F. E. FULLER,
Notary Public for Alaska.

District of Alaska,
Cape Nome Precinct,—ss.

H. Thorsen, P. O. Olsen, Gust Lynell, Dan Anderson, Arvid Akesson, Gus Bjornstad, and Gus Johnson, the mortgagors within named, and J. V. Sheldon, acting cashier of the Alaska Banking & Safe Deposit Company, the within named mortgagee, and on behalf of said [64½] mortgagee, being first duly sworn, each for himself, deposes and says that the said mortgage is made in good faith to secure the amounts named therein and without any design to hinder, delay or defraud creditors.

H. THORSEN.
GUS BJORNSTAD.
ARVID AKESSON.
DAN ANDERSON.
GUS JOHNSON.
PET OLSEN.
GUST LYNELL.
J. V. SHELDON.

(Testimony of Joe V. Sheldon.)

Subscribed and sworn to before me this 20th day
of February, 1911.

[Notarial Seal]

F. E. FULLER,
Notary Public for Alaska.

Filed at request of L. H. McCloy, Feb. 23, 1911,
at 45 minutes past 3 o'clock, Records Cape Nome
Recording District, Alaska.

GEO. D. SCHOFIELD,
Recorder.

By W. W. Sale,
Deputy."

Q. After the execution of this mortgage, all of
the gold-dust that was taken from the mine was taken
charge of by you, was it not?

Mr. ORTON.—Objected to as entirely immaterial.
It does not in any way tend to show that he guar-
anteed or promised to pay the bills of another, and
even if he did so guarantee it is illegal and comes
within the statutes of frauds.

The COURT.—Objection that it is immaterial is
sustained.

To which ruling of the Court the plaintiff duly ex-
cepted and an exception was allowed.

Q. Are you now in possession of the mine, and
when I speak [65] of "you" I do not mean you
personally, but is the bank in the possession of the
Thorsen Company's mine?

Mr. ORTON.—That is objected to as immaterial.

The COURT.—Objection sustained.

To which ruling of the Court the plaintiff duly ex-
cepted and an exception was allowed. .

(Testimony of Joe V. Sheldon.)

Q. Mr. Sheldon, did you have any agreement independent of this mortgage with Gust Lynell, Pete Olson and Mr. Thorsen, members of the Thorsen Mining Company, whereby they were not entitled to draw any money whatsoever from the bank?

A. Did I have an agreement with either of them?

Q. When I speak to you, I mean the bank, always.

A. No, sir, I did not.

Q. Did you communicate with the head officials of the bank outside as to your actions from time to time for the bank? A. I told them by letter.

Q. Did you write during the month of February as to what you had done with reference to the Thorsen Mining Company, did you make a report of that?

A. I think I told Mr. Thatcher. I told him I loaned some money to the Thorsen Mining Company.

Q. What did Mr. Thatcher say when you wrote and told him that?

A. He did not write to me about it.

Q. Did you, prior to the 16th day of February, did you employ Mr. Al Folsom to make an expert opinion—to give an expert opinion of the value of the mine? A. I did.

(Witness excused.) [66]

[**Testimony of Chas. H. Milot, for Plaintiff.**]

Mr. CHAS. H. MILOT, called by the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUNER.)

I am bookkeeper for Mr. Rowe. I have been in his employ since the 1st day of March, 1911. I have

(Testimony of Chas. H. Milot.)

entire control of the books. I am familiar with his books from the month of January, to a certain extent, because I went through the books and opened up a new set of books on the first of March. I know the Thorsen Mining Company account; on February 1st, 1911, they owed Mr. Rowe \$384.34, which was transferred to the new ledger. When I went to work for Mr. Rowe on the 1st day of March I found an account of Thorsen Mining Company on the books of Mr. Rowe. There were no instructions given me of any character with regard to continuing the account in that name, or otherwise. Eliminating the old account of the Thorsen Mining Company of \$384.43, there is a balance due Mr. Rowe of \$1,640.00. I attended to the collections at the bank. I did the banking at the bank of the Alaska Banking & Safe Deposit Co.

Q. What did you do with the bills of the Thorsen Company?

A. Gave them to Mr. Sheldon in the Alaska Bank.

Q. Did you have any conversation with him in regard to the payment of them?

A. I did. This was along somewhere about the first of April and May. I was representing Mr. Rowe. I asked Mr. Sheldon when the bill was going to be paid, and he said he had said he had the check ready; there were two payments made to me at the bank, I believe, but there was no further conversation until June, when I went in and [66½] asked him for a check, for I think the April and May account, and he said there was no money, and I said, "Well,

(Testimony of Chas. H. Milot.)

you are going to pay it anyhow?" and he said, "No." I presented the bills at the bank and left them there and he said he would send them out and have them O.K.'d and that then they would be paid.

On cross-examination the witness testified as follows:

(By Mr. ORTON.)

The bills were made out on this account, and those that were paid were paid by the check of the Thorsen Mining Company, signed Thorsen Mining Company.

(Witness excused.)

[**Testimony of E. W. Carlton, for Plaintiff.]**

E. W. CARLTON, called by the plaintiff, being duly sworn testified:

Direct Examination.

(By Mr. BRUNER.)

I am in the hardware business in Nome. I know the Alaska Banking & Safe Deposit Company and Mr. Sheldon. I did a trading business with the Thorsen Mining Company during a portion of last winter, and then shut down credit upon them along in the spring, about February 1st, I believe.

Q. What did Mr. Sheldon say or do with reference to the Thorsen account?

A. He said he would pay the bills the first of each month.

Q. Did he give you any directions as to where the bills were to be brought, or what should be done with them? A. Yes.

Q. What was it? [67] A. At the bank.

(Testimony of E. W. Carlton.)

Q. What? A. Send the bills to the bank.

Q. To the Alaska Bank? A. Yes.

Sheldon made out the checks. I continued to carry the account in the name of Thorsen Mining Company. I am my own bookkeeper; the balance due me on my account from February 13, 1911, is \$373.04. I presented the bills to Mr. Sheldon at the bank.

On cross-examination the witness testified as follows:

(By Mr. ORTON.)

The first conversation I had with Mr. Sheldon with relation to furnishing any goods to the Thorsen Company was about the middle of February. I had several conversations with Mr. Sheldon, the exact dates of which I do not recall, in regard to the Thorsen account, and when I asked Mr. Sheldon about the bills, all he said was, he thought they would be paid. He said to "take the bills to him" I can't remember when the first conversation was; the first conversation I remember definitely with him was about May or June.

On redirect examination the witness testified as follows:

(By Mr. BRUNER.)

Q. State whether or not the conversation with Mr. Sheldon in regard to the affairs of Thorsen Company was the cause of your resumption of credit relations with them. [68] A. It was; yes, sir.

Q. Well, now, your account which you have intro-

(Testimony of E. W. Carlton.)

duced in evidence, beginning February 13th, can you state whether this conversation with Mr. Sheldon was before or after the 13th of February?

A. I can't state the exact date, but that was about the date—that is about the date of the time it was.

I presented some of the bills to Mr. Sheldon and received payment by check signed "Thorsen Mining Company, S."

(Witness excused.)

[**Testimony of Geo. L. Marshall, for Plaintiff
(Recalled).]**

GEO. L. MARSHALL, recalled by the plaintiff, testified as follows:

(By Mr. BRUNER.)

Q. Were you present at any conversations held by Mr. Sheldon with regard to the Thorsen Mining Company's account, and if so state the time, place, and parties present?

A. Between the 11th of February and the 16th of February, Mr. Stevenson and Mr. Sheldon came into the office.

Q. Between the 11th and 16th of February of this year? A. Of this year.

Q. Where?

A. In the Cold Storage Company's office.

Q. Who were present?

A. Mr. Taggart and myself were in the office.

Q. And who else?

A. Mr. Stevenson and Mr. Sheldon came over there.

(Testimony of Geo. L. Marshall.)

Q. Now, state what the subject of that conversation was, and what was said.

A. Why, Mr. Stevenson and Mr. Sheldon came in and Mr. Sheldon [69] spoke about reopening their account, and giving them further meats to run their claims on; also, I was to take the bills to the bank the first of every month and he would pay them.

Q. Was that said in the presence of all the parties you have named there?

A. Yes, sir, Mr. Taggart, Mr. Sheldon, Mr. Stevenson and myself.

(Witness excused.)

[**Testimony of Wm. Morrison, for Plaintiff.**]

WM. MORRISON, called by plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. BRUNER.)

I am a clerk in Mr. Carlton's hardware store. I know Mr. Joe Sheldon and had a conversation with him about the Thorsen Mining Company account about the middle of February. I had occasion to converse with him two or three different times. About the 2d or 3d of March I presented the first bill to Mr. Sheldon and he told me it would be paid inside of two or three days, that he would have to send the bill out to the Thorsen people and have it O. K.'d, and then it would be all right. When I presented the statement the following month Mr. Sheldon told me as to his paying the bill contracted in the month of February then, that he thought it would be possible to pay this back outstanding bill that the

Thorsen people owed Carlton Hardware Co., and asked me to make out an itemized bill of Carlton's account and present it to him.

IT WAS ADMITTED by the respective counsel that proper assignments of these accounts were made to [70] W. J. Rowe, the plaintiff in this action.

Plaintiff thereupon rested.

[**Motion for Judgment of Nonsuit, etc.]**

Mr. ORTON.—At this time the defendant moves the Court for a judgment of nonsuit be given against the plaintiff, upon the grounds that the plaintiff has failed to prove a case sufficient to be submitted to the jury, being the cause mentioned in the Third subdivision, Section 237 of the Code.

We make this motion with reference to the entire action, and also wish to submit the same motion, separately, as to each cause of action, without the necessity of repeating the words over—we make the motion separately.

The COURT.—We shall consider it as being made in each cause of action without restating the grounds.

Mr. ORTON.—We desire also to submit a motion as to each cause of action upon the ground also, that the evidence fails to show that any goods were sold and delivered to the defendant by the respective plaintiffs named, and that the evidence fails to show that Mr. Sheldon had any authority on behalf of the defendant, Alaska Banking & Safe Deposit Company, to make an agreement for the sale of any goods to be delivered to Thorsen Mining Company.

Further, I would like to make a motion upon the additional grounds that the alleged guarantee [71] given by Mr. Sheldon is oral, and the alleged contract alleged to have been given by him was oral, and therefore within the Statutes of Frauds.

(After argument.)

The COURT.—The motion for a nonsuit is sustained; there has not been a case made out sufficient to be submitted to the jury.

To which ruling of the Court the plaintiff then and there duly excepted and an exception was allowed by the Court.

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the trial of this cause.

NOW, THEREFORE, in furtherance of justice and that right may be done, the plaintiff presents the foregoing as his Bill of Exceptions in this case, and prays that the same may be signed, settled and allowed, and certified by the judge as provided by law.

ELWOOD BRUNER,
Attorney for Plaintiff. [72]

[Order Approving Bill of Exceptions, etc.]

The foregoing BILL OF EXCEPTIONS is correct in all respects, and is hereby approved, settled and allowed, and certified as a part of the record in this case.

Done in open court at Nome, Alaska, this 24 day of Oct., 1912.

CORNELIUS D. MURANE,
U. S. District Judge.

Due service of the foregoing proposed Bill of Exceptions is hereby admitted this day of May, 1912.

.....
Attorney for Defendant. [73]

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Bill of Exceptions. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 11, 1912. John Sundback, Clerk. By J. A. B., Deputy.

Refiled in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 24, 1912. John Sundback, Clerk. By J. A. B., Deputy. Elwood Bruner, Attorney for Plaintiff. [74]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

WILLIAM J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Assignment of Errors.

COMES NOW the plaintiff in the above-entitled action, and assigns the following errors as having been committed on the trial and in the proceedings

in the above-entitled action, upon which he intends and does rely upon his writ of error to be prosecuted from the order granting a nonsuit and the judgment in said action, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows to wit:

Mr. BRUNER.—You were the acting manager of the bank as well as acting cashier, were you not?

Mr. FULLER.—Object to any testimony that he was acting manager of the bank, because there is no such officer known to the banking business.

The COURT.—Objection sustained.

Objection allowed.

2. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows, to wit:

Mr. BRUNER.—Do you remember taking a mortgage on behalf of the bank on the property of the Thorsen Mining Company? [75]

Mr. ORTON.—That is objected to as irrelevant and immaterial, and would not tend in any way to show that the Alaska Banking & Safe Deposit Company purchased any goods of any of these parties plaintiff, or any of them.

Mr. BRUNER.—We may just as well have this question settled now, and I will state to counsel and the Court that I am asking this question for the purpose of showing the course we intend to pursue in this case. We are going to contend that the Alaska Bank through this particular act on the part of Mr.

Sheldon, in sending the Thorsen Mining Company out these goods with which to mine the ground; we want to show it as a consideration for which he made these promises to pay for these goods which he had made to these parties, to show the absolute interest of the bank for which he was acting cashier and in charge of its affairs.

Mr. ORTON.—That don't in any way tend to show it, that he sent out Mr. Folsom to expert any ground belonging to the Thorsen Mining Company.

The COURT.—The objection is sustained; we cannot anticipate evidence in this way.

Exception allowed.

3. The Court erred in sustaining the objection of the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Did Mr. Sheldon or any other person on behalf of the Alaska Banking & Safe Deposit Company, order any goods to be delivered by you to the Thorsen Mining Company?

A. They did.

Mr. ORTON.—Objected to as leading and also a calling for a conclusion of the witness as to whether any person was acting on behalf of the Alaska Banking & Safe Deposit Company; we make the further objection that the cashier of the Alaska [76] Banking & Safe Deposit Company had no implied authority to order goods to be delivered to the Thorsen Mining Company.

Mr. BRUNER.—I am getting at their relations with these plaintiffs in that regard.

Mr. ORTON.—We object to the question because

the cashier of a bank has well-defined authorities, and it is not one of the implied authorities of a cashier of a bank to buy or purchase butcher's supplies, or any other goods, wares or merchandise, for any third person upon the credit of the bank; that is not one of the ordinary powers of a cashier, in the ordinary business carried on by a bank.

Mr. BRUNER.—We expect to show that Mr. Sheldon acting on behalf of the Alaska Bank and representing the Alaska Bank, made these purchases.

Mr. FULLER.—We object to the statement of counsel in the presence of the jury.

The COURT.—The witness has answered the question.

Mr. ORTON.—I move to strike out the answer of the witness.

The COURT.—The motion is sustained.

Exception allowed.

4. The Court erred in sustaining the objection of the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—State as near as you can what date it was in February when you made your arrangements with Mr. Sheldon.

Mr. ORTON.—That is objected to as the witness has not stated that he made any arrangements with Mr. Sheldon.

The COURT.—The question is immaterial so far, because it presumes something the witness has not stated. Objection sustained.

Exception allowed. [77]

5. The Court erred in sustaining the objection

of the defendant to the question of the witness, S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—State the circumstances, then, Mr. Taggart, with whom you consulted on behalf of the Alaska Bank.

Mr. ORTON.—That is objected to as assuming that he made any arrangements with the Alaska Bank.

The COURT.—Objection sustained.

Exception allowed.

6. The Court erred in sustaining the objection of the defendant to the question of the witness, S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you sell any goods to the Alaska Bank or on the order of the Alaska Bank, Mr. Taggart, and upon the order of the bank deliver the same to Thorsen Mining Company?

Mr. ORTON.—I object to that because I don't understand in a case of this kind that he can testify to the case wholesale in this manner. If counsel are going to put in their case in this leading manner, without any direct testimony concerning the identity of the person or persons to whom he sold the goods, we certainly shall object to the same because it is calling for the conclusion of the witness. We think he should state the facts leading up to this transaction and let the jury determine whether or not any goods were sold to the bank. We object to it as being incompetent, irrelevant and immaterial and leading.

The COURT.—Objection sustained.

Exception allowed.

7. The Court erred in sustaining the objection of the defendant to the question of the witness, S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you have any connection with the Alaska Banking and Safe Deposit Company in connection with the delivery [78] of any goods to the Thorsen Mining Company? A. I did.

Q. State what they were.

A. I delivered goods to the Thorsen Mining Company upon the order of Joe Sheldon, of the Alaska Bank.

Mr. ORTON.—That is objected to as a conclusion of the witness and move to strike out the statement of the witness. I think there should be some testimony as to what Mr. Sheldon said, and not give his conclusions. That is the very question for the Court and jury to determine from the evidence—upon what the order may have been based—what was said, and not allow the witness to testify to his conclusions, which is a mixed question of law and fact. I move to strike out the answer of the witness as his conclusion, without basing his answer upon what Mr. Sheldon said.

The COURT.—The conclusion will be stricken out. I think Mr. Taggart should simply state what their business relations were, what was said and done and what the transaction was, and show in what relation Mr. Sheldon stood with the bank in this transaction, which will be determined by what was said and done.

Exception allowed.

8. The Court erred in sustaining the objection of

the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Who paid for that mutton?

A. The bank did.

Q. The bank, through what person?

A. Well, the only one who had charge of the affairs.

Q. Well, who?

A. Mr. Sheldon did and authorized us to deliver to the Thorsen Mining Company whatever they wanted. [79]

Mr. FULLER.—We object to any statement of the witness that any party authorized him to do anything without giving the conversation and words upon which statement is made so that the Court and jury may judge whether there was any such authorization made.

The COURT.—Motion sustained. You will have to give the language Mr. Sheldon used in that regard.

Exception allowed.

9. The Court erred in sustaining the objection of the defendant to the question of the witness S. W. Taggart, the proceedings being as follows, to wit:

Mr. BRUNER.—Who paid them?

A. The Alaska Bank.

Q. To you?

A. I never saw the checks, but they were paid by the bank and at the bank.

Mr. ORTON.—We move to strike out the answer, now it appears that he never saw the checks himself, by his own answer. We move to strike out all the testimony relating to the payment of the checks by

the bank, as it now appears that they were not paid to him, and that he never has seen the checks.

The WITNESS.—I will take that back. I did see the last check because this controversy came up before the last check was deposited and I saw it.

Mr. ORTON.—We move to strike out everything except relating to the last check as hearsay.

The COURT.—Motion granted.

Exception allowed.

10. The Court erred in refusing to receive Plaintiff's Identification "A" in evidence, and thereupon the following proceedings were had:

Mr. BRUNER.—I now offer Plaintiff's Identification "A" [80] in evidence.

Mr. ORTON.—To which we object on the ground that it is incompetent, irrelevant and immaterial, and not binding upon the bank.

The COURT.— Objection sustained.

Exception allowed.

11. The Court erred in sustaining the objection of the defendant to the question of the witness, W. J. Rowe, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you ever demand your money from Mr. Sheldon? A. No, my bookkeeper did.

Mr. ORTON.—Move to strike out the answer, except the last part, except "No, sir," as it is not responsive.

The COURT.—Motion sustained.

Exception allowed.

12. The Court erred in sustaining the objection of the defendant to the question of the witness, W. J. Rowe, the proceedings being as follows, to wit:

Mr. BRUNER.—After you stopped the credit of the Thorsen Mining Company, did you ever at any time after that extend any credit to the Thorsen Company?

Mr. ORTON.—That is objected to as incompetent, irrelevant and immaterial, and not the proper way to prove accounts, and calls for a conclusion of the witness.

The COURT.—I think the witness may state the facts and allow the jury to draw their conclusions from the facts. This question calls simply for a conclusion of the witness.

A. No, sir, I did not.

Mr. ORTON.—Your Honor sustained the objection to the last question and I would ask that the answer of the witness be stricken out.

The COURT.—It may be stricken out. [81]

Exception allowed.

13. The Court erred in sustaining the objection of the defendant to the question of the witness, W. J. Rowe, the proceedings being as follows, to wit:

Mr. BRUNER.—Did you after that time in January that you have spoken of, did you extend any credit to the Thorsen Mining Company?

Mr. ORTON.—I understand your Honor has just this minute stricken that out. We object on the same grounds.

The COURT.—Objection sustained.

Exception allowed.

14. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows, to wit:

Mr. BRUNER.—After the execution of this mortgage, all the gold-dust that was taken from the mine was taken charge of by you, was it not?

Mr. ORTON.—Objected to as entirely immaterial; it does not in any way tend to show that he guaranteed or promised to pay the bills of another, and even if he did so guarantee it is illegal and comes within the statute of frauds.

The COURT.—The objection that it is immaterial sustained.

Exception allowed.

15. The Court erred in sustaining the objection of the defendant to the question of the witness, Joe V. Sheldon, the proceedings being as follows, to wit:

Mr. BRUNER.—Are you now in possession of the mine, and when I speak of "you," I do not mean you personally, but is the bank in the possession of the Thorsen Company's mine?

Mr. ORTON.—That is objected to as immaterial.

The COURT.—Objection sustained.

Exception allowed. [82]

16. The Court erred in sustaining defendant's motion of nonsuit against the plaintiff, and thereupon the following proceedings were had:

Mr. ORTON.—At this time the defendant moves the Court for a judgment of nonsuit be given against the plaintiff upon the grounds that the plaintiff has failed to prove a case sufficient to be submitted to the jury, being the cause mentioned in the third subdivision, section 237, of the Code.

We make this motion with reference to the entire action, and also wish to submit the same motion,

separately, as to each cause of action, without the necessity of repeating the words over—we make the motion separately.

The COURT.—We shall consider it as being made in each cause of action without restating the grounds.

Mr. ORTON.—We desire also to submit a motion as to each cause of action upon the ground also, that the evidence fails to show that any goods were sold and delivered to the defendant by the respective plaintiffs named, and that the evidence fails to show that Mr. Sheldon had any authority on behalf of the defendant, Alaska Banking & Safe Deposit Company, to make an agreement for the sale of any goods to be delivered to Thorsen Mining Company.

Further, I would like to make a motion upon the additional grounds that the alleged guarantee given by Mr. Sheldon is oral, and the alleged contract alleged to have been given by him was oral, and therefore within the statute of frauds.

(After argument.)

The COURT.—The motion for a nonsuit is sustained; there has not been a case made out sufficient to be submitted to the jury.

To which ruling of the Court the plaintiff then and there duly excepted and an exception was allowed by the Court. [83]

WHEREFORE, plaintiff prays that the order granting nonsuit in said action and the judgment therein be reversed, and a new trial be granted therein.

Dated at Nome, Alaska, October 26, 1912.

ELWOOD BRUNER,
Attorney for Plaintiff.

Due service of the within Assignment of Errors is hereby accepted at Nome, Alaska, this 26th day of October, 1912, by receiving a copy thereof.

IRA D. ORTON,
Attorney for Defendant. [84]

[Endorsed]: No. 2303. Dist. Court, Dist. of Alaska, Second Division. William J. Rowe, Plff., vs. Alaska Banking & Safe Deposit Co., Dft. Assignment of Errors. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [85]

*In the District Court for the District of Alaska,
Second Division.*

W. J. ROWE, Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO., a Corporation,

Defendant.

Petition for Writ of Error.

W. J. Rowe, the plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the Judge of the above-entitled court in granting a judgment of nonsuit in the above-entitled action on the 3d day of October, 1911, and the judgment made and entered thereon on October 14, 1911, comes now by Elwood Bruner, his attorney, and petitions said Court for an order allowing said plaintiff to prosecute a Writ of Error to the United States Court of

Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also, that an order be made fixing the amount of security which said plaintiff shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

ELWOOD BRUNER,

Attorney for Plaintiff.

Service of the foregoing petition admitted this 26th day of October, 1912.

IRA D. ORTON,

Attorney for Defendant. [86]

Order Allowing Writ of Error.

Now, on this 26th day of October, A. D. 1912, IT IS ORDERED that said Writ of Error be allowed as prayed for, the said plaintiff, W. J. Rowe, to give a bond in the sum of \$250.00/100, which shall operate as a supersedeas.

Done in open court at Nome, Alaska, this 26th day of October, 1912.

CORNELIUS D. MURANE,

Judge of the District Court, District of Alaska, Second Division.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plaintiff,

vs. Alaska Banking & Safe Deposit Co., Defendant.
Petition for Writ of Error & Order Allowing Writ
of Error. Filed in the office of the Clerk of the Dis-
trict Court of Alaska, Second Division, at Nome.
Oct. 26, 1912. John Sundback, Clerk. By J. A. B.,
Deputy. Elwood Bruner, Attorney for Plaintiff.
[87]

*In the District Court for the District of Alaska,
Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO., a
Corporation,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, W. J. Rowe, as principal, and Thorulf
Lehmann and Frank J. Grimm as sureties, are held
and firmly bound unto the Alaska Banking & Safe
Deposit Co., a corporation, defendant in the above-
entitled action in the sum of Two Hundred and Fifty
(\$250.00) Dollars, for the payment of which well and
truly to be made we bind ourselves, our and each of
our heirs, executors, administrators and assigns,
firmly by these presents.

Sealed with our seals and dated this 26th day of
October, 1912.

WHEREAS, lately at a session of the United
States District Court for the District of Alaska, Sec-

ond Division, in an action pending in said court between W. J. Rowe, as plaintiff, and the Alaska Banking & Safe Deposit Co., a corporation, defendant, a judgment of nonsuit was on the 14th day of October, 1911, rendered and entered in favor of said defendant and against said plaintiff, and said plaintiff having obtained from said District Court an order allowing a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to review said judgment, and a Citation to said Alaska Banking [88] & Safe Deposit Company, is about to be issued, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California;

NOW, THEREFORE, the condition of the above obligation is such, that if the said W. J. Rowe, plaintiff, shall prosecute his said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

W. J. ROWE, [Seal]

Principal.

THORULF LEHMANN, [Seal]

F. J. GRIMM, [Seal]

Sureties.

United States of America,
District of Alaska,—ss.

Thorulf Lehmann and Frank J. Grimm, being first duly sworn, each for himself, and not one for the other, deposes and says:

I am a resident of the District of Alaska, and a

surety on the within and foregoing undertaking; that I am not a counsellor or attorney at law, marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that I am worth the sum of \$250.00 over and above all debts and liabilities and exclusive of property exempt from execution.

THORULF LEHMANN.

F. J. GRIMM.

Subscribed and sworn to before me this 26th day of October, 1912.

[Notarial Seal] L. W. HAYDEN,
Notary Public, District of Alaska. [89]

On this 26th day of October, 1912, the foregoing bond being presented in open court, is hereby approved.

CORNELIUS D. MURANE,
District Judge.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Bond on Writ of Error. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [90]

*In the District Court, District of Alaska, Second
Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

**Order Enlarging Time [to February 1, 1913, to File
Record Thereof and to Docket Cause in Circuit
Court of Appeals].**

Upon the application of Elwood Bruner, attorney for the plaintiff in error in the above-entitled cause, it appearing to the satisfaction of the Court that it will be impossible for the plaintiff in error to docket the transcript on writ of error with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, until the 1st day of February, 1913, which will be after the return day set in the writ of error granted herein, to wit, the 26th day of November, 1912;

IT IS ORDERED for the time of filing and docketing said writ of error and the transcript, records and proceedings therein, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of Seattle, State of Washington, be and is hereby enlarged to and including the 1st day of February, 1913.

Done in open court this 26th day of October, 1912.

CORNELIUS D. MURANE,
U. S. District Judge.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Order Enlarging Time. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [91]

In the District Court, District of Alaska, Second Division.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Stipulation [That Cause may be Heard at Seattle, Wash.].

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties in the above-entitled cause, that the said cause may be heard on appeal before the United States Circuit Court of Appeals at Seattle, Washington.

Dated at Nome, Alaska, October 26th, 1912.

ELWOOD BRUNER,
Attorney for Plaintiff.

IRA D. ORTON,
Attorney for Defendant.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plain-

tiff, vs. Alaska Banking & Safe Deposit Company. Stipulation. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [92]

*In the District Court for the District of Alaska,
Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COMPANY, a Corporation,

Defendant.

Order [Directing That Cause be Set for Hearing at Seattle, Wash.].

IT APPEARING TO THE COURT, that the attorneys for the respective parties in the above-entitled cause have stipulated that the said cause be heard on appeal before the United States Circuit Court of Appeals, at Seattle, Washington, and good cause appearing therefor, upon motion of Elwood Bruner, it is hereby ordered that the said cause be set for hearing before the said Circuit Court of Appeals at Seattle, Washington.

Dated at Nome, Alaska, October 26th, 1912.

CORNELIUS D. MURANE,
U. S. District Judge.

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Div. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Company,

Defendant. Order. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [93]

UNITED STATES OF AMERICA.

District Court, District of Alaska, Second Division.

Cause No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO.,
a Corporation,

Defendant.

Praecipe [for Transcript on Writ of Error].

To the Clerk of the Above-entitled Court:

You will please prepare transcript on Writ of Error in above-entitled cause of Complaint, Answer, and Reply, Order Directing Verdict, Judgment, Bill of Exceptions, Minutes of Court and papers on Writ of Error.

ELWOOD BRUNER,
Attorney for Plaintiff.

[Endorsed]: Cause No. 2303. District Court, District of Alaska, _____ Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., a Corporation, Defendant. Praecipe. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 24, 1912. John Sundback, Clerk. By _____, Deputy. [94]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2303.

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT COM-
PANY, a Corporation,

Defendant.

I, John Sundback, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 94, both inclusive, are a true and exact transcript of the Complaint, Answer, Reply, Court Minutes of October 3, 1911 (Judgment for nonsuit), Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Bond on Writ of Error, Order Enlarging Time, Stipulation for Hearing at Seattle, Washington, Order for Hearing at Seattle, Washington, and Praecepice for Transcript on Writ of Error, in the case of W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Company, a Corporation, Defendant, No. 2303—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the original Writ of Error and original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$40.25, paid by Elwood Bruner,
attorney for plaintiff.

In witness whereof, I have hereunto set my hand
and affixed the seal of said Court this 29th day of
October, A. D. 1912.

[Seal]

J. SUNDBACK,
Clerk. [95]

Writ of Error.

The President of the United States of America, to
the Honorable CORNELIUS D. MURANE,
Judge of the United States District Court for
the District of Alaska, Second Division, Greet-
ing:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between W. J.
Rowe, plaintiff in error, and Alaska Banking & Safe
Deposit Co., a corporation, defendant in error, a
manifest error hath happened to the great damage
of the said W. J. Rowe, plaintiff in error, as by his
complaint appears;

We, being willing, that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid, in that behalf, do com-
mand you, if judgment be given therein, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things con-
cerning the same to the Justices of the United States
Circuit Court of Appeals, in the City of San Fran-
cisco, State of California, together with this writ, so

as to have the same at said place and said circuit on the 25th day of November, 1912, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct these errors, what of right and according to the laws and customs of the United States should be done. [96]

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of October, 1912.

Attest my hand and the Seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's Office, in Nome, Alaska, this 26th day of October, 1912.

[Seal] J. SUNDBACK,
Clerk of the United States District Court for the
District of Alaska, Second Division.

Allowed this 26th day of October, 1912.
CORNELIUS D. MURANE,
Judge of the United States District Court for the
District of Alaska, Second Division.

Service of the foregoing Writ of Error is hereby admitted this 26th day of October, 1912

IRA D. ORTON,
Attorney for Defendant. [97]

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff in Error, vs. Alaska Banking & Safe Deposit Co., Defendant in Error. Writ of Error.

Filed in the Office of the Clerk of the District Court
of Alaska, Second Division at Nome. Oct. 26, 1912.
John Sundback, Clerk. By J. A. B., Deputy. [98]

*In the United States District Court for the District
of Alaska, Second Division.*

W. J. ROWE,

Plaintiff,

vs.

ALASKA BANKING & SAFE DEPOSIT CO.,
a Corporation,

Defendant.

Citation.

United States of America,—ss.

The President of the United States, to Alaska Banking & Safe Deposit Co., a Corporation, Defendant Above Named, and to Ira D. Orton, Its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date of this writ, to wit, on the 25th day of November, 1912, pursuant to a writ of error filed in the Clerk's office of the District Court for the District of Alaska, Second Division, wherein W. J. Rowe is plaintiff in error, and you, said Alaska Banking & Safe Deposit Co., a corporation, are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should

not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of October, 1912, and of the Independence of [99] the United States the one hundred and thirty-seventh.

CORNELIUS D. MURANE,

Judge of the United States District Court for the District of Alaska, Second Division.

[Seal] Attest: J. SUNDBACK,
Clerk of the United States District Court, District of Alaska, Second Div.

Personal service of the foregoing citation made on me and receipt of a copy thereof admitted this 26th day of October, 1912.

IRA D. ORTON,
Attorney for Defendant. [100]

[Endorsed]: No. 2303. In the District Court, District of Alaska, Second Division. W. J. Rowe, Plaintiff, vs. Alaska Banking & Safe Deposit Co., Defendant. Citation. Filed in the Office of the Clerk of the District Court of Alaska, Second Division at Nome. Oct. 26, 1912. John Sundback, Clerk. By J. A. B., Deputy. [101]

[Endorsed]: No. 2239. United States Circuit Court of Appeals for the Ninth Circuit. W. J. Rowe, Plaintiff in Error, vs. Alaska Banking & Safe Deposit Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Second Division.

Received November 11, 1912.

F. D. MONCKTON,
Clerk.

Filed January 9, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.